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The International Journal of Cooperative Law (IJCL) is a peer-reviewed, open access online journal, founded by Ius mCooperativum in 2018. It is the first international journal in the field of cooperative law. It aspires to become a venue for lawyers, legal scholars and other persons interested in the topics and challenges that the discipline of cooperative law faces.

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Introductory remarks

Encouraged by the positive reactions to the publication of the first issue of the International Journal of Cooperative Law (IJCL) the editors decided to continue testing the ground for such a journal.
Besides articles based on contributions to the 2nd biannual International Forum on Cooperative Law at Athens in September 2018, this second issue of the IJCL also contains articles written by authors who did not take part in the Athens event. This, the fact that the editors received more articles than they could publish, the feedback from readers and the momentum the IJCL helped creating for the organization of a special session on cooperative law on the occasion of the European Research Conference of the International Cooperative Alliance (ICA) at Berlin in August 2019 endorse the endeavor of publishing such a journal.

In their Note to the readers of the 1st issue of the IJCL the editors/publishers justify this endeavor. The IJCL is to provide a forum through which knowledge on cooperative law would be created and lead, eventually, to the elaboration of a theory of cooperative law. A theory of cooperative law, in turn, would help find answers to legal questions and help form and protect the identity of cooperatives. This identity has been put at risk, particularly over the past 50 years, not the least because of the lack of such a theory.

The editors/publishers "hold the creation of knowledge [of cooperative law] through authors … from different legal traditions as a precondition" for the IJCL to qualify as a scientific journal." But they underline that the "object [of the IJCL] is not international law … Nor is [the journal] a comparative law journal, although [they] hope that its analyses concerning various jurisdictions will be a precious source for comparatists. For the rest, [they] wish that papers coming from any country will be fruitful to readers from all countries."

Notwithstanding this editorial policy, the editors, authors and readers engage in international and in comparative law. Regional and international cooperative law applies to/is applied by cooperatives and/or is part of national cooperative law. By selecting articles for publication in the IJCL, by writing articles for it, by reading these articles the editors, authors and readers, having been inculturated in their respective legal tradition, engage in comparative processes. The editors decide what "cooperative *law"* is and they decide what "*cooperative* law" is. The qualifier "law" varies from legal tradition to legal tradition. It results from the continuous debates on the nexus between policy and law and from the constantly renegotiated separation of law from other norms (internormativity). In their judging of whether a contribution qualifies as a contribution on *cooperative* law the editors do already what the IJCL is to allow them eventually to do, namely to make such a judgment based on knowledge created through the IJCL. But even the best compilation of information on various cooperative laws does not constitute cooperative law. Law is more than the sum total of laws. Like the editors, the authors and readers of the IJCL engage in comparative processes. These will be the more beneficial the better they communicate with each other. The risk of not understanding each other, heightened by the use of a common language,

will increase the more the IJCL succeeds in representing all legal traditions, which it failed for the second time to do.

Unless we draw on the knowledge accumulated by comparative lawyers on how to avoid misunderstandings in the sense of not understanding and how to try and understand each other, we shall not be able to use each other´s knowledge of cooperative law. In addition to abiding by their advice to situate specific legal rules and institutions in the wider context of the respective legal system and to go beyond the texts to the "legal formants" or "legal determinants", and in addition to accepting that the international consensus on a set of cooperative values and principles forming the identity of cooperatives does not equal understanding each other, editors, authors and readers might keep in mind that a number of sub-texts underlie cooperative laws. Firstly, the interpretation of cooperative law varies according to whether the phenomenon of cooperatives precedes the cooperative legislation or whether the law is to create the phenomenon. Likewise, the classification of cooperative law as regulating organizational matters of cooperatives or as regulating also the cooperative sector, including pubic or semi-public institutions entrusted with monitoring and promoting cooperatives will vary accordingly. Secondly, the original type of cooperatives in a country – consumer, agricultural, savings and credit or other – will have left its mark on the cooperative law for a long time. Thirdly, the finality of the law will depend, among other factors, on the efficiency of the welfare (state) system in a country. Fourthly, the conception of cooperatives as associations or societies will determine which rules apply in case of lacunae in the cooperative law. That will also depend on which of the three aspects of the objective of cooperatives - economic, social and cultural - the law is to/has to place an emphasis on. Fifthly, a similar difference arises where in one jurisdiction the relationship between the cooperative and its members and that between the members qualifies as an associative relationship or is conceived as a contractual relationship. Sixthly, the very notion of law varies from legal system to legal system. If and where cooperatives are seen as institutionalized solidarity, an individualistic notion of law that disregards the relational aspect of law will not do.

These and other sub-texts are seldom made explicit. Being aware of them helps understanding and thus to make the best use of the knowledge of foreign law. Therefore, despite the editorial policy of the IJCL editors, authors and readers cannot escape the hurdles of international and comparative law on the way to creating knowledge on cooperative law.

Without the authors, the reviewers and the proof-readers the editors would not have reached the aim of publishing this 2nd issue of the IJCL. Members of the advisory board served again in multiple roles. On behalf of my fellow editors and on my own behalf I wish to thank them all!

Kauniainen/Finland, August 2019
Hagen Henrÿ

Articles

VOLUNTARY MEMBERSHIP: UP TO WHICH POINT DO COOPERATIVES SUPPORT LIBERALISM?

David Hiez
Professor at the University of Luxembourg
david.hiez@uni.lu

1. Introduction

In 1950, the most significant French legal thinker in cooperative law of the 20th century (Coutant 1950, p. 199) wrote about voluntary membership (« LIBRE ADHÊSION »):

« Ce principe a une portée très large, puisque par ses deux aspects essentiels - liberté d'adhérer et liberté de ne pas adhérer il différencie la Société Coopérative à la fois de la Société de droit commun basée sur le profit et de l'entreprise étatique d'un régime d'économie collective. Cette double distinction […]ne nous intéressera que dans son premier aspect […] puisque l'état de droit actuel ne justifie une différenciation, sur le plan juridique, qu'à l'égard des institutions soumises au même régime de base, c'est-à-dire des Sociétés Civiles et Commerciales, de Personnes et de Capitaux »[1].

In other words, cooperatives are opposed to profit-oriented companies because of their open membership, and to public enterprises in collective economies because of their freedom of association, and it is more important to focus on the first aspect of the principle, since the risk of confusion is lower with public enterprises in our societies. If we look at the literature in cooperative law, its advice seems to have been perfectly heard: more or less, one can find nearly nothing about voluntary membership, apart from the recurrent tune of cooperative autonomy[2](ICA, 2015).

Nevertheless, in 2015, the European Court of Human Rights condemned Greece (ECHR, 3rd of December 2015, MYTILINAIOS ET KOSTAKIS V. GREECE) for a provision regulating a mandatory cooperative, arguing of its contradiction with the freedom of association (European Convention on Human Rights, Article 11). No one, at least in the academic area, would contest the majesty of the freedom of association, even in its negative side, that is increasingly considered. However, when one looks at the various cases in which the freedom not to associate has been stated, they often feel a discomfort, since the

[1][This principle has a very large scope, because by its two essential aspects - freedom to adhere and freedom not to adhere, it differentiates the cooperative society from both the company under ordinary law and based on profit, and the State enterprise under a collective economy regime. This double distinction (…) will be of interest only in its first aspect (…) since the current state of law justifies a legal distinction only with regard to institutions subjected to the same basic legal regime, i.e. civil and commercial, private and public companies.] Translated by myself.
[2] Namely the first principle.

goat of the free rider is never far. Therefore, contrary to common opinion, it is not useless to scrutinize the meaning and strength of voluntary membership, in order to discuss its limits and its compatibility with the freedom of association.

To achieve that inquiry, we will demonstrate first the ambivalence of voluntary membership in cooperative thinking (Section 2), related to the complexity of voluntary membership in cooperative practice (3); then, we will explain the development of the freedom to associate and its connection with voluntary membership (4); finally, in order to draw some conclusions, we will make a first assessment of the arguments for and against voluntary membership nowadays (5).

2. Voluntary Membership in Cooperative Thinking

We do not claim to make an exhaustive overview of cooperative doctrine about voluntary membership, but we will try to show that it has never been as obvious as it appears today. And to do so, we will refer both to the academic writings as well as the publications of the cooperative organizations, notably the International Cooperative Alliance (hereafter "the ICA").

The fathers of cooperative thinking do not seem to have paid attention to that question, probably because it was not thinkable that people could be forced to join cooperatives in a time when it was a dream that they even wish to do it. The question arose progressively, partly through practice but also with the development of scientific works especially dedicated to cooperatives.

The first effort was made to identify what a cooperative is. In that respect, it seemed that the question of voluntary membership may appear with various features depending on the political structure of the global society. Fauquet gives a very good example of such an unexpected configuration: he opposes the agricultural cooperatives created in the second half of the 19th century in western France, fully complying with cooperative principles and notably voluntary membership, and the so-called « fruitières », agricultural societies emerging in the middle ages for the production of cheese, in which membership could be compulsory by virtue of custom (Fauquet, 1935, nos. 40 et sec.). The same criterion was used to distinguish cooperatives from corporations in medieval ages (Mladenatz 1933, p. 12). Therefore, voluntary membership was considered as a key point to characterizing cooperatives. Mandatory collective organizations were numerous before modernity, or at least before the 19th century, but they were inserted into special political and cultural systems, distinct from the one in which cooperatives developed. However, surprisingly, we cannot state that cooperative thinking established that feature as a mandatory principle.

On the contrary, both writers and organizations were very hesitant. It appeared notably through the first ICA principles. The strength of that voluntary membership principle is already indirectly evident in the by-laws of the Rochdale Pioneers[3] and their application, since they claim for no support from the State (Lambert 1967, esp. p. 255). It remains one of the four mandatory principles (among seven) stated by the

[3] The experience of Rochdale has played such an important role on the establishment of ICA principles that they won the intellectual primacy, beyond their practical dimension.

ICA in its Paris Congress in 1937[4] (ICA, 1937) in which it is formulated as free membership. But here is the core of the ambiguity, since free membership is not synonymous with voluntary membership. If the voluntary requirement refers explicitly to the freedom to join or not, the free membership refers as well, and maybe mainly, to the right to join, against the temptation in some cooperatives to close the cooperative to the benefit of its founders.

And the debates about cooperative principles for the ICA Congress of 1966 in Liège reminded that voluntary membership had not been explicitly stated (Kerinec 1966, esp. p. 40). The report on the Congress by Georges Lasserre did not propose the inclusion of voluntary membership as a mandatory principle, even after the debates (Lasserre 1966, p. 345). However, finally, the Congress agreed to the adoption of a principle of voluntary membership (Lambert 1966, p. 475). The principle is also adopted by the Commission on cooperative principles in Vienna in 1966 (Draperi 2012, pp. 176-177). And we know that the final stone on the way has been the adoption of the first cooperative principle in 1995: voluntary and open membership.

At that time, writers were not clearer. For example, Lambert focuses on voluntary membership, to distinguish it from free joint, as opposed to closed, cooperatives (Lambert 1967, p. 259). He pleads for the autonomy principle and voluntary membership, but nuances it a little bit. According to him, a cooperative may be established by the majority of a group, so that it is established willingly, but membership may be imposed on people from the minority: for example, from a joint to a federation if some cooperators disagree, or if the majority of a community decides to establish a cooperative for the draining of the zone (Lambert 1967, p. 259). Fauquet goes further and considers that the question of mandatory membership is not essential; he points out that it may occur if a consumer cooperative remains the only store in a place, or when the state makes membership compulsory to organize and regulate a production (Fauquet 1935, pp. 79 et seq.).

In the '60s, as the final conclusions of both the scientific conference of Liège and the institutional Commission for cooperative principles of the ICA show, the voluntary membership principle had acquired its certainty for the majority (Ibid., p.241)[5], and was on the way to become a major and uncontested feature. But the debates have been deep, and many people remained cautious. Convincingly, it has been claimed that this voluntary membership would not be a specific cooperative principle, contrary to the open-door principle (Vargas 2015). Actually, mandatory membership does not differ from mandatory incorporation into a company.

Nevertheless, the first ICA principle established in 1995 perfectly illustrates the ambiguity of voluntary membership (Vargas 2015). Actually, the voluntary feature of cooperatives is included in the question of membership, besides the open-door principle. However, that first principle specifies that cooperatives are

[4] In 1937 the ICA distinguished between four imperative and three auxiliary principles. The four imperative ones were namely: 1. Open membership, 2. Democratic member control (one member, one vote), 3. Distribution of surplus in proportion to trade and 4. Payment of limited interest on capital; the three auxiliary ones were: 5. Political and religious neutrality, 6. Cash trading (no credit extended) and 7. Promotion of education.

[5] It is remarkable that the report for the Soviet Union insisted on the compliance with that principle: membership in consumer cooperatives had been mandatory at the beginning of the Bolshevik revolution (1919-1923), as well as in Kolkhozes, but this is considered as derogation and the Party struggled with it.

voluntary organizations. Indeed, the voluntary feature may be connected to the organization itself instead of membership. It must be noted, about it, that the fourth principle is related to a close question: autonomy. The cooperative must be autonomous, both from public and private entities, and that autonomy is explicitly connected to self-help and democratic control, that is to say, again, to membership. In other words, cooperative principles are inter-connected, they all constitute a bundle, and the insistence on one or the other is strongly dependent on the major trends of the society. Therefore, the increasing attention paid to voluntary membership could be the consequence of the development of the individual freedom to associate. Conceptually, voluntariness and autonomy may be distinguished, since a voluntary organization can be dependent on another organization, so that its autonomy is broken. But a compulsory organization cannot be really autonomous.

3. The Complexity of Voluntary Membership in Cooperative Practice

As the principle of voluntary membership appeared ambiguous at a theoretical level, we will try to determine if that ambiguity is as well present in practice. It seems that the first cooperatives were created by voluntary members, and their will was even very strong to overcome the difficulties they met. In some cases, a very large community could be a member of the cooperative, for example in Raiffeisen cooperatives in some German villages (Mladenatz 1933, pp. 60 et seq.), but one cannot equate an attractive cooperative with a mandatory one. The question could have arisen when the State asked the cooperatives to fill missions of general interest, notably the distribution of food during the First World War; but it does not seem that this implied mandatory membership for the consumers (Draperi 2012, pp. 95 et seq.). At that time, the closest phenomenon to a mandatory cooperative was the link sometimes established between membership in a cooperative and in a religious or political group (mainly Christian or socialist). But that question was not themed as a question of obligation but rather of neutrality. However, all the cooperatives did not comply with this principle, and for many years it was not considered as a compulsory principle.

With the Russian revolution appeared a new relationship between the State and the cooperatives, since the former considered that it could use cooperatives to achieve its public policies, not only by delegation, but by making the cooperatives part of the political system (Mauss 1997, pp. 290 et seq.). In spite of the opposition of the cooperative organizations, well installed in Russia, the Bolsheviks contrived mandatory membership for some social groups and attributed to the cooperatives an institutional role with the Soviets (Draperi 2012). The economic weaknesses of the Soviet Union and the strength of cooperative organizations obliged Lenin to give up that hold on cooperatives, and in 1923-1924, cooperatives recovered their free organization. During that period, the ICA never excluded Russian cooperatives and national cooperatives maintained, or tried to maintain, economic relationships with them. Surely, the entanglement of Russian cooperatives into the Soviet system was considered problematic, but people did not deem it enough to disqualify their cooperative nature, and some authors wondered if it was not a new experience for cooperative organizations, from which they could learn.

Indeed, during the inter-war period, many countries experienced new relationships between cooperatives and political power. V. Tanner, president of the ICA, distinguished liberal economy regimes (France, UK before the first world war), regulated economy or partially command economy regimes (after the first

world war), capitalist dictatorial command economy regimes (Italy, Germany, Austria), socialist dictatorial economy regimes (USSR), and socialist democratic regimes (that have not been established so far). (Tanner 1937, p.159). Of course, this is true for Italy with the development of fascism, but that was comparable with the Soviet situation. Germany also tried to launch new social policies, as did the United Kingdom earlier, and France after the Second World War. This did not entail directly institutional relationships with the cooperative organizations, but it multiplied hybrid enterprises and mixed economy phenomena (Belly 1988), and rendered less clear the distinction between mandatory and voluntary. At that time topics like collective economy (Milhaud, 1950), *régies coopératives* (Lavergne 1937, pp.177-210), delegation to cooperatives of public interest missions (Fauquet 1935, no. 51), or municipalism and local development (Belly 1988, pp. 71 et sec.) emerged. Surely, cooperatives are not necessarily pure, they can be mixed with other models, as it is nowadays considered with the phenomenon of companization. But other mixes are possible with the public sector: forms favoring the transfer from public to cooperative sector, such as *régies coopératives*, public missions filled by delegation to cooperatives, or public control to challenge the capitalist economy (Fauquet 1935, nos. 50 et seq.).

Another trend for cooperatives came with decolonization. Most colonies had a cooperative legislation, installed by the colonial States. With independence, the new States had to decide if they kept or removed ancient regulations. All the States did not choose the same way, but many came through collective experiences, and in that path they often mixed traditional community organizations and the cooperative shape (Münkner 2015, p. 37; Develtere 1998), so that the cooperatives met again mandatory membership as well as the presence of civil servants on their boards. Depending on the countries, the phenomenon lasted more or less a long time, but many countries went the same way until the neo-liberal orientation of international organizations in the 1990s, and the last legislations contrary to voluntary membership were still in force in the 2000s (Larue et al. 2014). Again, that situation was considered as problematic, but did not entail expulsion from the ICA.

Besides these exceptions, we would like to mention the special physiognomy of mandatory membership in second degree cooperatives, i.e. inter-cooperation. In order to structure the cooperative sector, it may be useful to make the participation in a federation or a union mandatory. This is the case in France for agricultural cooperatives, which have to join a federation competent to conduct a compulsory cooperative audit (French Rural Code, art. L.527-1). This is also true in Germany for all cooperatives (Münkner 2013, pp. 413 et seq.). However, in these cases, the obligation is limited, firstly because no one is obliged to join a cooperative; secondly because the cooperative itself, even if it has to join a federation, keeps the possibility to choose the federation. Other countries stated a general obligation for every cooperative to join a federation, for example Mexico, but that provision was changed in 1994 (Rojas Herrera 2013, p. 525).

One can find other examples of mandatory cooperatives when the cooperative has been used by the State as a legal form to achieve a public policy. Such is the case for the development of wine-growers' cooperatives in Greece, as in the case before the ECHR, but the phenomenon is also present in Italy for the production and transformation of polyethylene (WRITTEN QUESTION E-2362/01 to the Commission). These last examples may be surprising, because they cannot be considered exotic, either old or distant And they could appear as remains of ancient practice, not because they do not comply with

the first cooperative principle in force since 1995, but because they contradict a more general right, internationally recognized: the right not to associate.

4. The Development of the Freedom to Associate

Cooperators remember, even if it was long ago, that their first relationship with the right to associate has been to claim it. Indeed, the first cooperatives often faced the reluctance, if not the opposition, of the State, which saw in the cooperatives dangerous collective organizations, able to destabilize its power, since, as community-based, cooperatives are associations. With the growth of their economic power, cooperatives became stronger, and their political subversion decreased, so that the State was more and more supportive of them. Therefore, in general, they did not profit directly from the development of the freedom of association, even if they supported it because it met the interests of their members.

Freedom of association was first stated in the Universal Declaration of Human Rights in 1948: "(1) Everyone has the right to freedom of peaceful assembly and association; (2) No one may be compelled to belong to an association" (Universal Declaration of Human Rights, art. 20). But the weakness of this declaration consists in its lack of sanction, contrary to the subsequent European Convention on Human Rights, established in 1950. Its article 11 stated:

*"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests ; 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."(*ECHR, art. 11)[6]

That freedom of association seems nowadays so obvious that one may wonder if it is still useful, but it remains lively (Verlhac 2012), as recent examples show: condemnation of France because of the too rigorous restrictions for soldiers to associate (ADEFDROMIL V. FRANCE and MATELLY v. FRANCE) and the consequent legalization of military trade unions in French legislation (LOI No. 2015-917 du 28 juillet 2015, art. 11).

But the voluntary membership principle is more connected to the negative side of the freedom of association: the freedom not to associate. That solution has been established for the first time by the ECHR in 1993 (ECHR, 30th of June 1993, SIGURDUR A. SIGURJONSSON V. ICELAND, ECHR, 1st of July 1997, GUSTAFSON V. SWEDEN) in a case about people claiming against the obligation to enter hunting societies for landlords, relying on their ecological convictions. The interest of the case is that it provides some criteria to assess the validity of the restrictions on the freedom not to associate. Taking for granted that there is an infringement of the liberty not to associate, "Such interference breaches Article 11

[6] The article was supposed to contain a paragraph, formulated as *"No one may be compelled to an association"*, but due to the existence at the time of closed-shop systems, the provision was adopted in the form that we still have today. In this sense see *Preparatory Work on Article 11 of the European Convention on Human Rights*.

unless it is “prescribed by law”, is directed towards one or more of the legitimate aims set out in paragraph 2 and is “necessary in a democratic society” for the achievement of that aim or aims” (ECHR, 29th of April 1999, CHASSAGNOU AND OTHERS V. FRANCE, no.104). The touchy point is, surely, to decide if the infringement is necessary, which requires determining if it is proportionate to the legitimate purpose that is pursued. Apart from the rigor of the term "necessity", the Court states that “Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.” (CHASSAGNOU AND OTHERS V. FRANCE, no. 112). The Court added that, when the rights invoked to justify the infringement was not stated by the Convention itself, the appreciation has to be more rigorous (CHASSAGNOU AND OTHERS V. FRANCE, no.113).

In the MYTILINAIOS AND KOSTAKIS v. GREECE case (ECHR, 3rd of December 2015, MYTILINAIOS AND KOSTAKIS V. GREECE), a mandatory cooperative was precisely considered as an infringement of the freedom not to associate. Apparently, the ECHR has adopted a solution perfectly complying with the cooperative principles. We may even wonder if the fundamental rights have not been, in that case, a better protection of cooperative identity than cooperative law itself, since the European Convention on Human Rights has ensured the freedom of cooperators better than Greek cooperative law. To answer this question, it is necessary to go back to the facts of the case. In Samos Island, the development of winegrowing has been stimulated and protected through the obligation for winegrowers to join a cooperative (Greek law no 6085/1934). The story has been a success and the wine of Samos has become better and its trading far easier. Unsurprisingly, some cooperative members wished to leave the cooperative and trade their wine themselves and, after the refusal of several Greek courts, they were successful before the ECHR. To state if the final solution must be approved from the point of view of cooperative law, it is necessary to detail the way cooperatives are included in the category of association in the context of the European Convention on Human Rights.

Since cooperatives are considered as associations for the application of article 11 of the ECHR, to assess the consequence of the freedom not to associate on the cooperative and the connection with mandatory membership, it is required to apply the criterion of the ECHR to the cooperatives. Two points must be distinguished at that stage: the qualification as an association, and the assessment of the infringement of the freedom not to associate.

Indeed, if the cooperative is to be regarded as an association, the Court of Strasbourg has admitted that some organizations, close to associations but characterized by their public feature, are not subject to article 11; therefore, it is necessary to check whether the cooperatives that we consider are public entities, which could be possible since they are mandatory. The European case law requires three criteria to be met in order to qualify an association as a public entity: they must be established by law and not by individual will; the association is integrated into the structure of the State; and exceptional powers are attributed to the association (Verlhac 2012, note 163). It is difficult to answer abstractly to the question, but some observations are possible. First of all, in the recent case against Greece, the wine-growing cooperatives have not been considered as public law associations, since they had not been established by a law, nor were they integrated into the structure of the State. That example is interesting, for it reminds that it is not sufficient to oblige individuals to join a cooperative; the cooperative itself must be created by the law. If

one adds the condition of State integration, very few cooperatives, even mandatory, are likely to be qualified as public law associations and avoid the application of article 11. However, no requirement of case law is in explicit contradiction with the cooperative definition.

All the cooperatives which are not considered public law associations are submitted to article 11, so that their members are protected by the freedom not to associate. Concerning the restrictions to that right, notably mandatory membership, the second paragraph of article 11 lays down three conditions for their validity: they must be provided by the law; they must be necessary in a democratic society; and they must be established in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. Do the cooperatives with mandatory membership meet these three conditions? Again, it is difficult to answer generally to the question, and again we will start from the example of the Greek case.

The Court observes that the restriction is grounded in a national law (L. 6085/1934) and admitted easily that the mandatory membership aimed at protecting the rights and freedoms of others by protecting the quality of the Samos Muscat wine and the income of the winegrowers. Therefore, the first and the third conditions were fulfilled. But the second condition, i.e. the necessity in a democratic world, has been considered as lacking. The judges made a concrete assessment, taking into consideration many arguments from both parties, and they concluded that the necessity that could exist when the law was adopted is no longer established nowadays, as the wine is well exported and the mandatory membership does not look necessary to ensuring the quality of the wine and, therefore, good trading for winegrowers. Indeed, the question is not only to decide if the mandatory membership produces positive effects; as there is an infringement of an individual right, it must be more than useful, it must be necessary. And the judges said, in this case, that it is not. However, it does not mean that it cannot be; it becomes a case by case test. And an author has numbered four different hypotheses of mandatory membership: contract-based membership, *de facto* membership, automatic membership, and automatic and compulsory membership (Muukkonen 2007). Surely, that variety pleads in favor of a case by case approach. However, one cannot ignore that the judgment of the Court contradicts that of Greek courts.

The starting point is that the solution is in contradiction with the Greek constitution, or other provisions alike (about the Finnish constitution and legislation, see Muukkonen 2007), that provided a ground for compulsory membership: "*establishment by law of compulsory cooperatives serving purposes of common benefit or public interest or common exploitation of farming areas or other wealth producing sources shall be permitted, on condition however that the equal treatment of all participants shall be assured" (*Greek Constitution, art. 12.5. Douvitsa 2018, pp.128 et seq.). This does not allow any compulsory membership, since it is conditioned by the equal treatment of the participants, which means all the potential members. Contrary to the European Court's reasoning, the Greek constitution relies on equality, not on freedom.

To assess the potential validity of impediments to freedom not to associate, we can take two examples. First, the hypothesis of production groupings in the agricultural area, where a country thinks that a mandatory grouping is necessary to organize a special sector. In that respect, the European Court has never denied the validity of such mandatory grouping, which can be a cooperative, and at least in France the Supreme Court stated its validity (C. Cass no. 11-24.568). Nevertheless, if the grouping is a

cooperative, mandatory membership is only limited to the organization of the sector, and not to other possible activities of the cooperative, since they are not considered necessary.

The merits of the second example concern a shopping center. All the shops of a single shopping center are not run by a unique person or company, and some services are, by nature, common to all the shop-owners: cleaning, security, advertising for the shopping center as such …. To organize this, the owner of the premises provides in the lease agreement with the shop-owners that they are obliged to join the association in charge of these common services. Of course, membership in the association implies the right to take part in the decisions, but also the obligation to pay the annual membership fees. Some shop-owners have claimed that it was an infringement of their right not to associate as provided by the ECHR, and they won before the French judges (C. Cass. no. 00-14.637. C. Cass. no. 02-10.778. C. Cass. no. 09-65.045. C. Cass. no. 10-23.928. C. Cass no. 11-17.587. Very recently: C. Cass. no. 17-23.211); the Strasbourg Court did not rule. Formally, the solution may be admitted, since the practice relies on no explicit provision, so that the first condition of article 11 paragraph 2 is not fulfilled. However, it creates a new problem: the services are provided to and benefit all the shop-owners, even the ones who chose not to be members. Therefore, it is necessary to evaluate the compensation that they must pay to the association, and judges admitted that it cannot be assimilated in the membership fee, whereas these fees are fixed in consideration of the cost of the services. The whole story could be understandable, but it creates complications and new costs to make the evaluation. And, finally, there is a doubt that the Supreme Court will accept any compensation, since it could refrain the effectiveness of the right to withdraw.

This last example is very interesting, since it shows the absurdity of a full application of the right not to associate. Again, a solution could be found if the legislature adopted a special provision to provide a ground for mandatory membership, but any lawyer knows how difficult it can be to go through a legislative process. This story is a perfect illustration of the conflict between individual and collective interests, and shows which one is considered more frequently.

Concretely, the example of the shopping center offers two different hypotheses: either the shop-owner refuses to perform his obligation and to join the association, or after a certain period he withdraws from the association, despite mandatory membership, arguing the same invalidity of the provision. Apparently, the two situations are similar, but the second one opens the question of the engagement for a certain period. If there is more or less a consensus to consider mandatory cooperatives as an exception to the core definition of an authentic cooperative, another mechanism is debated in relation to the same principle: the regulation of withdrawal. Logically, voluntary membership means freedom to join or not the cooperative, but also the possibility to leave it; this is the open-door principle (Vargas 2015). However, this is not so absolute, since it may be necessary for the collectivity of members to plan their investments, revenues, general costs, for the future, in order to adapt them to their number and share the burden. In that respect, it may be necessary to regulate the possibility for one or several members to withdraw at any time (Fici, 2013, pp.58 et seq.). That is the opinion of the ICA in its guidance note, ensuring the protection of the cooperative by the possibility for it to condition the reimbursement of capital. Many jurisdictions have had the debate and the solutions vary: Argentina (Cracogna 2013, p.176), SCE (Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE), art. 15),

OHADA (Hiez and Tadjudje 2013, pp. 95 et seq.), India (Veerakumaran 2013, pp. 457 et seq.) … We would like to take only one example, since it appears typical by its evolution.

In French law, the open-door principle is implicitly stated through the variable capital mechanism (Commercial Code (FR), art. L.231-1), but the general cooperative law refers to by-laws to regulate its modalities (Law bill (FR) no. 47-1775, art. 7). Therefore, the by-laws may establish some conditions to withdrawal, such as a notice period, or a minimum period for membership. However, the authors agree that the provisions of by-laws could not actually forbid any withdrawal. The question occurred especially for agricultural cooperatives, the legal provisions concerning them being more detailed, and in which the importance of investments require a higher protection for the collectivity of members. Fifty years ago, the by-laws stated a minimum period for membership of approximately 50 years, which in practice rendered withdrawal impossible. The courts decided that the provision was not valid since the period was longer than a professional life (Hiez 2018, nos. 251.66 and 251-67). Nowadays, most by-laws provide for a period of ten years, and the legislature allowed anticipated withdrawal in case of *force majeure* or, exceptionally, for legitimate reason, subject to the authorization of the board (Rural Code (FR), art. R.522-4). Actually, some proposals are made to remove any minimum period.

That evolution is very significant. Of course, the question has not been discussed in the same way in all the cooperative families, since it has not the same impact in all of them, for example in consumer cooperatives. And agricultural cooperatives have developed in a somewhat corporatist sector (Veillon 2017, étude 23), in which a lifetime membership did not appear so strange[7] (Raymond, 1966, pp.48-49). But individualism has progressed, and the weight of collective organizations had to be balanced with individual freedom. Nowadays, some agricultural cooperatives have become very big and are considered as organizations autonomous from their members, so that some people, among which some cooperators, think that the cooperator must be protected against the cooperative itself, as against any firm with which they do business. The cooperative organizations consider that the repeal of the minimum period for membership would be an attack on the identity of agricultural cooperatives. Clearly, that would be a challenge for them and would considerably weaken their business model. Meanwhile, the regulation of withdrawal exists more or less everywhere, but it is not always achieved in the same way; for example, some legislation admits a fully free withdrawal, with only the possibility for the cooperative to delay the reimbursement of shares (Cracogna 2013, p. 196. For a more general overview and a critical appraisal: Pönkä 2018, pp. 45 et seq.).

5. Voluntary membership: for and against

For sure, voluntary membership is a cooperative principle and we do not think that it should be challenged as a principle. However, the fundamental rights reasoning introduced by the ECHR attributes to this principle an absolute feature that it never had in cooperative law. Therefore, the purpose of that paragraph is to question that absolute feature by considering the reasons *pro* and *contra* voluntary

[7] In the discussion about the open-door principle during the Congress of Liège in 1966, P. Raymond, who speaks for French agricultural cooperatives, did not even mention that point: Raymond, 1966, p. 49.

membership or, in other words, for and against the compatibility of mandatory cooperatives with cooperative law.

The first reason to adopt a vigorous conception of voluntary membership is the attachment of cooperative thinking to individual freedom. The guidance note on the cooperative principles is very clear about it: "The importance of voluntary and open membership is shown by the global co-operative movements accepting this as the first cooperative principle in the alliance {…}. This first principle is an expression of the right to freedom of association" (ICA, 2015, pp. 5 et seq.). And the guidance note refers explicitly to the Universal Declaration of Human Rights. However, we must notice that, after these strong general words, the comments do not go back to it anymore, and focus on the prohibition of arbitrary conditions to membership and free withdrawal. However, this does not weaken the principle itself, and no doubt the claim for democracy is another sign of the attachment of the cooperative movement to liberalism.

The second reason to defend voluntary membership is its integration with the other cooperative principles. We already referred to the democratic feature of cooperatives (second principle), but we could connect it with any of the seven principles. The most relevant one is probably the fourth one: autonomy and independence. We realized that both principles were sometimes mixed up, since mandatory membership means also involvement of the State into the cooperative's life. But autonomy is firstly the autonomy of each member, and the fourth principle states it clearly: cooperatives are autonomous, … and the cooperative values mention self-help as well. If the cooperative aims at the satisfaction of its members, it is not only to provide them with goods or services, it is also to help them not to depend on charity or State support. The satisfaction of its aspirations goes first to its emancipation. The same thing could be said about the democratic functioning of the cooperative, which develops the ability of all individuals to express their wishes, ideas, and stimulates them to take part in the elaboration and adoption of collective decisions. This is the meaning of the freedom promoted by cooperatives, far from the tokenistic conception of liberty.

More technically, one could argue that cooperatives are private persons, so that they cannot require people to join. We have seen that article 11 of the European Convention on Human Rights states three conditions to qualify an association as public, and one of them is the requirement of their creation by provisions of law. If the cooperative is an association of persons, it cannot be established by law. This is a truism, but it has the merit to go back to the very definition of cooperative. Voluntary membership would not be a feature of a cooperative, but one of its constitutive elements.

In spite of these strong arguments, some others have been pointed out to defend the interest of mandatory membership in certain circumstances. A danger that cooperatives face is the attribution of the burden of some activities on its members and the permission for third parties to enjoy their outcomes. In such cases, it may be profitable not to join the cooperative: that is the well-known problem of the free rider phenomenon. The free rider may corrupt the system through two strategies: profit from advantages related to membership without the corresponding duties, or a member who decides to withdraw temporarily for his selfish interest (Iliopoulos and Theodorakopoulou 2014, p. 666). In both hypotheses, mandatory membership appears a solution to prevent that temptation.

This is not a theoretical question for cooperatives, but concrete examples may be given, without going to the caricatural instance of demutualization. Concerning Mexican cooperative law, an author observes that the adoption of voluntary membership of cooperatives into unions or federations, to avoid corporatism attached to previous compulsory membership, implied "the reproduction of the "free-rider" phenomenon within the cooperative movement" (Rojas-Herrera 2013, p. 539). One may wonder if the claimants in Mythilinaios and Kostakis v. Greece are not such free riders as well: relying on the development achieved by the cooperative, some successful winegrowers wish to sell on their own in order to maximize their revenue. We do not know enough to make any certain statement, but this has surely been the perception of the cooperative Greek movement. To go on with the opinion of the same author, Iliopoulos considers that compulsory membership in the cooperative seems to have been important in the first stage in order to establish the cooperative and allow it to launch all the mechanisms that ensured its development and protection (Iliopoulos and Theodorakopoulou 2014, p. 667).

The last argument in favor of a friendly look at mandatory membership is the risk of a voluntary but tokenistic membership. And the most important, both for the member and for the cooperative, is the engagement in more than theoretical membership. Let's quote Albert Fauquet: "Neither the mere act of joint nor the essential act of will that the cooperative institution requires from its members, … Therefore, the core opposition is not between facultative joint and mandatory membership, but between the indifferent or fickle member and the active cooperator, involved towards its partners and the common enterprise, and who acts in consequence" (Fauquet 1935, pp. 81-82, translated by ourselves). That last quotation is enlightening, since it reminds that the question of voluntary membership is a point amongst other ones and that it must be balanced. This does not mean that mandatory cooperative is the best solution, surely it is not, but it may be useful in some circumstances. Indeed, specialists of participation have demonstrated that it could show various facets: voluntary participation, but also stimulated or provoked participation (Meister 1969).

In the end, we think that, even if cooperative thinking shares major grounds with liberalism, its position differs totally concerning the relationships between the individual and the grouping. Whereas individualism relies on fundamental rights to protect the individual from the State and other individuals, including collective bodies, the cooperative believes in the development of each individual thanks to groupings. Therefore, the approach of mandatory membership in a cooperative, i.e. a grouping, cannot be the same. Both cooperative doctrine and human rights reasoning condemn it as a principle, but cooperative thinking, built on the fruits of experimentation, is far more flexible. Moreover, considering the emancipation of each individual by a full membership in a cooperative, it may more easily accept mandatory membership since, when balanced with other considerations, this may not necessarily prevent the members from finding their place in the cooperative. A condition for that possible emancipation is the equal treatment in the cooperative (as in the Greek constitution), that ensures all members that they will be able to take part in the decisions, so that their mandatory membership is accompanied by their possible influence on the grouping itself.

Technically, another question arises about the conflict of sources. In the Mythilinaios and Kostakis case, the Strasbourg Court based its decision logically on the European Convention. Nonetheless, it must not be ignored that it contradicted not only a legal provision but also a constitutional one, so that an international norm surpassed a constitutional norm. This is not a surprise before an international court, but it could not

occur before a national one, except in some very few countries that admit the primacy of international law. However, to strengthen cooperative law, this reminds of the necessity to develop international cooperative law.

Bibliography

Belly M. (1988), *Les systèmes d'économie mixte dans les économies modernes : actes du XVIIe congrès du CIRIEC Liège,* Liège, Belgium : CIRIEC

Cracogna D. (2013), The Framework Law for the Cooperatives in Latin America, in Fici A.,

Cracogna D., Henrÿ H. (Ed.) (2013), *International Handbook of Cooperative Law,*Berlin, Germany: Springer

Cracogna D. (2013), Argentina, in Fici A., Cracogna D., Henrÿ H. (Ed.) (2013), *International Handbook of Cooperative Law,* Berlin, Germany: Springer

Coutant L. (1950), *L'évolution du droit coopératif de ses origines à 1950*, Reims, France: Matot-Braine

Develtere P. (1998), *Économie sociale et développement. Les coopératives, mutuelles et associations dans les pays en développement,* Louvain-la-Neuve, Belgium : De Boeck

Draperi J.-F. (2012), *La république coopérative*, Louvain-la- Neuve, Belgium : Larcier

Fauquet G. (1935), *Le secteur coopératif. Essai sur la place de l'homme dans les coopératives et de celles-ci dans l'économie,* Brussels, Belgium : PUF

Fici A., Cracogna D., Henrÿ H. (Ed.) (2013), *International Handbook of Cooperative Law,* Berlin, Germany: Springer

Fici A. (2013), An Introduction to Cooperative Law, in Fici A., Cracogna D., Henrÿ H. (Ed.) (2013), *International Handbook of Cooperative Law,* Berlin, Germany: Springer

Hiez D. and Tadjudje W. (2013), The OHADA Cooperative Regulation, in Fici A., Cracogna D., Henrÿ H. (Ed.) (2013), International Handbook of Cooperative Law, Berlin, Germany: Springer

Hiez D. (2018), *Sociétés coopératives : Création Organisation Fonctionnement*, Paris, France : Dalloz

International Co-operative Alliance (1937), *Compte rendu du XVe de l'Alliance coopérative internationale, à Paris du 6 au 9 septembre 1937*

International Co-operative Alliance (1966), Vingt-troisième congrès (Vienne, 5-8 septembre 1966). Ordre du jour et rapports, 1966, p. 184

Kassavetis D., Douvitsa I., *The Mytilinaios and Kostakis v. Greece Case of the European Court of Human Rights: The Beginning of the End for Mandatory Cooperatives in Greece*, forthcoming

Kerinec R. (1966), Réponse de la FNCC au questionnaire de l'ACI sur les principes coopératifs, in *Les principes coopératifs hier, aujourd'hui, demain Liège, 4-6 mars 1966,* Paris, France : Institut des études coopératives de Paris (pp. 21 et seq.)

Lambert P. (1966), Présentation et discussion des conclusions adoptées, *in Les principes coopératives, hier, aujourd'hui, demain, Liège, 4-6 mars 1966,* Paris, France : Institut des Études Coopératives (pp. 469 et seq.)

Lambert P. (1966), Conclusions du colloque, , *in Les principes coopératives, hier, aujourd'hui, demain, Liège, 4-6 mars 1966*, Paris, France : Institut des Études Coopératives (pp. 512 et seq.)

Lambert P. (1967), Historique des règles de Rochdale, in *Les principes coopératives, hier, aujourd'hui, demain, Liège, 4-6 mars 1966*, Paris, France : Institut des Études Coopératives.

Lassere G. (1966), Rapport : « Problèmes et difficultés d'application des règles de Rochdale dans les différents mouvements et pour chaque forme de coopération », par le Professeur Roger SAINTALARY. Échange de vues sur le rapport de synthèse, in *Les principes coopératives, hier, aujourd'hui, demain, Liège, 4-6 mars 1966*, Paris, France : Institut des Études Coopératives (pp. 345 et seq.)

Lavergne B. (1937), Le rapide essor des régies coopératives anglaises, spécialement de la régie coopérative des transports publics à Londres, *Révue des études coopératives (1950)*

Mauss M., Fournier M. (1997), *Écrits politiques* (pp. 290 ff.), Paris, France : Fayard.

Meister A. (1969), *Participation, animation et développement,* Paris, France : Anthropos (quoted by J-F. Draperi, p. 151)

Milhaud E. (1950), *La place de la coopération dans l'économie collective,* Paris, France : FNCC

Mladenatz G. (1933), *Histoire des doctrines cooperatives,* translated to French by Nicolas Leseanu. Paris, France: PUF

Münkner H.-H. (2015), *Co-operative Principles and Co-operative Law*, 2nd edition, LIT Verlag Berlin-Münster-Wien-Zürich-London

Münkner H.-H. (2013), Germany (pp. 413 ff.) in Cracogna D., Fici A., H. Henrÿ (Ed.), *International Handbook of Cooperative Law,* Berlin, Germany: Springer

Raymond P. (1966), Les principes coopératifs et leur application dans la coopération agricole, in *Les principes coopératives, hier, aujourd'hui, demain, Liège, 4-6 mars 1966*, Paris, France : Institut des Études Coopératives

Rojas Herrera J. J. (2013), Mexico In Cracogna D., Fici A., Henrÿ H.(Ed.), *International Handbook of Cooperative Law*, (p. 525). Berlin, Germany: Springer

Tanner V. (1937), *La place de la coopération dans différents systèmes économiques* (p. 159), Paris, France (quoted by J-F. Draperi, p. 172)

Veerakumaran G. (2013), India, in Fici A., Cracogna D., Henrÿ H. (Ed.) (2013), *International Handbook of Cooperative Law*, Berlin, Germany: Springer

Veillon D. (2017), Coopératives - Perspective historique du mouvement coopératif dans l'agriculture, Rev.Dr.rur., 2017, étude 23

Verlhac J. (2012), *Droit associatif européen*. Brussels, Belgium : Larcier

Legislative texts and international conventions

Commercial Code (FR). Available at: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000005634379

Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (OJ L 207, 18.8.2003, p. 1–24). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R1435

European Convention on Human Rights. Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf

LAW (GR) Bill No. 6085/1934

LOI (FR) No. 47-1775 du 10 septembre 1947 portant statut de la coopération (JORF n°0214 of 11th of September 1947 page 9088). Available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000684004

LOI (FR) No. 2015-917 du 28 juillet 2015 actualisant la programmation militaire pour les années 2015 à 2019 et portant diverses dispositions concernant la défense (JORF no. 0173 of 29th of July 2015, p. 12873), art. 11. Available at : https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000030943133&categorieLien=id

Preparatory Work on Article 11 of the European Convention on Human Rights. Information Document Prepared by the Secretariat of the Commission, European Commission of Human Rights, Strasbourg, 16th of August 1956, [Available at : https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART11-DH(56)16-EN1693924.PDF]).

Rural and Sea Fishing Code (FR). Available at: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071367

Universal Declaration of Human Rights. Available at: http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf

Case-Law

- **ECHR**

ECHR, 30th of June 1993, SIGURDUR A. SIGURJONSSON C. ISLANDE, no. 16130/90, A, n°264, ECLI:CE:ECHR:1993:0630JUD001613090 [Available at: https://hudoc.echr.coe.int/eng#{"itemid":["001-57844"]}]

ECHR, 1st of July 1997, GUSTAFSON V. SWEEDEN, no. 23196/94, Reports of judgments and decisions 1997-IV, ECLI:CE:ECHR:1997:0701JUD002319694 [Available at: https://hudoc.echr.coe.int/eng#{"itemid":["001-58051"]}]

ECHR, 29th of April 1999, CHASSAGNOU AND OTHERS V. FRANCE, nos. 25088/94, 28331/95 and 28443/95, Reports of Judgments and Decisions 1999-III, ECLI:CE:ECHR:1999:0429JUD002508894 [Available at: https://hudoc.echr.coe.int/eng#{"fulltext":["Chassagnou"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-58288"]}]

ECHR, 2th of October 2014, ADEFDROMIL V. FRANCE and Matelly v. FRANCE, nos. 32191/09 and 10609/10, ECHR, 2014:178, ECLI:CE:ECHR:2014:1002JUD003219109

[Available at: http://hudoc.echr.coe.int/eng?i=001-146700, French version]

ECHR, 3rd of December 2015, MYTILINAIOS ET KOSTAKIS V. GREECE, no. 29389/11, ECLI:CE:ECHR:2015:1203JUD002938911 [Available at: https://hudoc.echr.coe.int/eng#{"fulltext":["MYTILINAIOS%20KOSTAKIS"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-158962"]} (French version only)]

- **National Case-Law**

C. Cass. (FR), 1st civil chamber, 20th of December 2012, no. 11-24.568 (Unpublished)

C. Cass. (FR) 3rd civil chamber, 5th of December 2001, no. 00-14.637 (Unpublished)

Related works: Rev. loyers 2002, p. 114; Loyers et copr. 2003, comm. 179; JCP G 2003, I, 10190

C. Cass. (FR). 3rd civil chamber, 12th of June 2003, no. 02-10.778 (Published at Bulletin civ. no. 2003 III N° 125 p. 112)

Related works: Loyers et copr. 2003. Comm. 179; JCP 2003, II, 10190

C. Cass. (FR), 20th of May 2010, no. 09-65.045 (Published at Bulletin civ. no. 118 of 2010)

Related works: Loyers et copr. 2010. Comm. 195, obs. E. Chavance ; JCP E 2010. 1692, note J. Raynaud; JCP 2010. 925, note F. Planckeel; JCP 2010. Doctr. 983, nº 1, obs. M. Mekki

C. Cass. (FR), 3rd civil chamber, 23rd of November 2011 no. 10-23.928 (Published FS-P+B),

Related works: JCP 2012. Doctr. 63, nº 15, obs. Y.-M. Serinet ; Loyers et copr. 2012. Étude 4, C. Rouqette-Térouanne

C. Cass. (FR), 1st civil chamber, 12th of July 2012, no. 11-17.587 (Published at Bulletin civ. no. 161 of 2012)

Related works: D. 2012. 2490, Y. Rouquet ; D. 2012. 2490, H. Kenfack ; Loyers et copr. 2012. Comm. 299, E. Chavance ; Rev. sociétés 2013. 301, note K. Rodriguez ; JCP 2012. 1003, nº 12, note Y.-M. Serinet ; JCP 2012. 1103, note Y.-M. Serinet ; Loyers et copr. 2012. Repère 8, J. Monéger. – C. ROUQUETTE-TÉROUANNE, Effectivité de la nullité absolue et restitutions réciproques, Loyers et copr. 2012. 4

C. Cass. (FR), 3rd civil chamber, 11th of October 2018, no. 17-23.211 (Published under no. 889 F-P+B, Bulletin civ.)

Related works: especially D. Hiez, Liberté de ne pas s'associer, les encombrants centres commerciaux, *RTDcom*, October-December 2018, no. 4. AJ Contrat 2018. 531, obs. F. Buy; M. Ghiglino, Bail commercial: clause d'adhésion obligatoire et liberté d'association, Dalloz actualité 5 nov. 2018 ; JurisData nº 2018-017504 ; E. Chavance, Nullité - Sur l'obligation d'adhérer à une association des commerçants, Loyers et copr. 2018, nº 11, comm. 225 ; Veille, JCP E nº 43-44, act. 803

Journals and magazines

Douvitsa I., National constitutions and cooperatives: an overview, *IJCL*, 2018, vol. 1, pp. 128 et seq.

Muukkonen M., Association law in Finland, *International Journal of Not-for-Profit Law* April, 2007, L.76, Thomas Reuter.

Vargas Vassero C. (2015), El principio cooperative de puertas abiertas (adhesiön voluntariay abierta). Topico o realidad en la legislaciön y en la practica societaria, Ciriec-Espana, Revista juridical no. 27/2015.

Iliopoulos C. and Theodorakopoulou I. (2014), Mandatory Cooperatives and the Free Rider Problem: The Case of Santo Wines in Santorini, Greece, *Annals of Public and Cooperative Economics* 85:4 2014, CIRIEC, pp. 663-681

Webography:

International Co-operative Alliance (2015), *Guidance Notes to the Co-operative Principles*, available on https://www.ica.coop/en/media/library/research-and-reviews/the-guidance-notes-on-the-co-operative-principles , pp. 5-15 (English version)

Larue F., Gning T. (2014), *Le nouveau modèle coopératif dans l'espace OHADA : un outil pour la professionnalisation des organisations paysannes ?,* [Available at : http://www.fondation-farm.org/zoe/doc/farm_etude_ohada_resumexec.pdf].

Pönkä V. (2018), The legal nature of cooperative membership, *Journal of Entrepreneurial and Organizational Diversity*, Vol. 7, Iss. 2 [Available at: https://www.euricse.eu/wp-content/uploads/2019/02/3-Ponka.pdf]

WRITTEN QUESTION E-2362/01 by Amalia Sartori (PPE-DE), Stefano Zappalà (PPE-DE), Raffaele Lombardo (PPE-DE), Mario Mauro (PPE-DE), Renato Brunetta (PPE-DE)and Mario Mantovani (PPE-DE) to the Commission. Recycling of polythene waste, OJ C 115E, 16.5.2002, pp. 64–65. [Availabe at : https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CE.2002.115.01.0064.01.ENG&toc=OJ:C:2002:115E:TOC].

THE JUDICIAL PRECEDENT AS A TOOL FOR RESEARCH AND STUDY OF COOPERATIVE LAW: THE BRAZILIAN EXPERIENCE

Milena T. G. Cesar[1]

Analyst lawyer in the Organization of Brazilian Cooperatives (OCB)

milena.cesar@ocb.coop.br

Abstract: This article aims to present, through comparative, historical and statistical method the importance of the judicial precedent for the research and study of Cooperative Law from the approach between the common law and the Brazilian legal system, traditionally tied to the civil law system. Although the Codes are the main sources of Brazilian Law, judicial precedent conquered relevant space in the Brazilian legal system due to the culture of valuing standardization of jurisprudential understanding tied to the technological modernization of the Brazilian legal structure. Based on that, the OCB System, as an entity that represents Brazilian cooperatives, has refined the research work and study of Cooperative Law through monitoring and disclosure of judicial decisions to strengthen the cooperative movement in Brazil.

Keywords: *Civil law, Common law, Stare decisis, Control of constitutionality, Brazilian system of precedents, Cooperative Law.*

The approach of the legal systems: civil law and common law.

We seek to establish in this work that the procedural reform tied to the technological modernization of the Brazilian judicial structure contributes to the progress of research and study of Cooperative Law, creating opportunities for the knowledge and strengthening of the sector before the Judicial Branch through procedural and institutional action strategies.

For a better understanding of contemporary Brazilian law, it is opportune to comprehend the approach of the traditional legal systems: civil law and common law. Although the formation of these traditional legal systems is tied to different histories of power, both have gone through a long evolutionary process that culminated on the approach and, consequently, in the construction of diverse legal systems by several countries, as the Brazil.

The civil law system, also denominated as the Roman-Germanic system, originated from the codified Roman system, but the legal reasoning of the common law tradition took shape over many centuries,

[1] This work is a result of the author's presentation at the 2nd International Forum on Cooperative Law, held between 26-28 September 2018, in Hellenic Open University, Athens.

culminating in the full development of the stare decisis concept in the nineteenth century. The civil law system was adopted by the countries of continental Europe such as France, Italy, Germany, Spain, Portugal and, consequently, countries colonized by them such as Brazil, Argentina, Colombia and Mexico. As the legal reasoning of the civil law tradition is logical-deductive, the decisions are the result of the application of the law, which is the main source of the legal system.

The common law, also denominated as the Anglo-Saxon system, it was created in England and influenced almost every country from the former British colonies, such as the United States of America, Canada, Australia and New Zealand. The common law doctrine established for judges the legal duty to respect previous legal decisions, also called precedents, since they were sources of English Common Law. In this legal system, the use of codified principles in decisions is not usual.

The evolution of civil law is marked, among others factors, by the constitutionalist movement that allows the judge to decide on the validity and effectiveness of a law before the Constitution, giving the power to rebuild the law in an interpretive way. Thus, when the law is absent or incompatible with the Constitution, the judge is authorized to adapt it to protect the constitutional principles and the fundamental rights of the citizen.

The definition of concepts such as "public order", "social interest", "good faith" and "dignity of the human person" has a discretionary role for the judge, who integrates the normative command with his own opinions, since the solution cannot be fully found in the legal rule (BARROSO, 2005, p. 11). Since the law could be interpreted in many ways, the emergence of different decisions for equal cases became an unavoidable consequence.

Aware of the possibility of different decisions for equal cases, the common law evolved its legal reasoning and developed the institute called *stare decisis*, which comes from the Latin *stare decisis et non quieta movere* and means "to stand by decided matters." The apex of the legal evolution of *stare decisis* occurred at the end of the 19th century, a historic moment in which the English House of Lords recognized the need to tie inferior judges and courts to their own decisions, precisely so that similar cases were treated in the same way (expressed as "treat like cases alike").

Thus, even though the precedents have been fundamental to the development of common law tradition, the *stare decisis* is the institute that ensures the equality and legal certainty in contemporary jurisdiction, since it binds the legal rule interpretation to the legal duty of respect to the judicial precedents.

The Brazilian system of precedents

Although the Brazilian legal system is affiliated with the civil law tradition, since its rights and obligations rest predominantly on the legal rule, as established in Article 5, *caput* and section II of the Federal Constitution of 1988 (CF of 1988)[2], there is no doubt that the contemporary Brazilian judge approaches the judge affiliated to the common law tradition.

[2] From now, the Federal Constitution of 1988 will be mentioned throughout this article only as CF of 1988.

The influence of common law conceptss, such as the doctrine of precedents and *stare decisis*, culminated in the affirmation of a system of precedents adapted to the characteristics of a civil law system and, consequently, to the promotion of legal precedents to a formal source of the Brazilian law. The approach of the traditional legal systems is notoriously tied to the constitutionalist conception of the supremacy of the Constitution over other legal rules. Those rules ceased to be the main source of the law and were tested for their constitutional validity, effectiveness and consistency with the Brazilian Constitution, especially with the principles and fundamental rights contained therein.

The activity of constitutional jurisdiction gained strength from the CF of 1988, which amplified the power granted to the judges and courts to interpret the legal rules and to decide if they are contrary to the Constitution. This control, known as "judicial review", is carried out under two modalities, called diffuse control and concentrated constitutionality. The concentrated control of constitutionality is monopolized by the Supreme Federal Court[3], its decisions may declare the unconstitutionality of the law and have binding effectiveness (known by the Latin term *erga omnes*)[4].

The diffused control of constitutionality, in its turn, is carried out by any judge and court (including the Supreme Federal Court itself). Their decisions may declare particular legal rules unconstitutional. However, in this control modality, court decisions have no binding effect. Thus, the legal rule is not eliminated from the legal system and its ineffectiveness is restricted to the parties involved in the conflict (knows in Latin as *inter partes*).

The power assigned to judges and courts to interpret legal rules with texts full of indeterminate concepts and open rules allows them to give judicial decisions without binding effect. That permitted a proliferation of different decisions in identical situations. For Wambier (2009, p. 22), the continental dimensions of the country combined with a decentralized judicial structure were also factors that contributed to a wide range of different of rulings.

Hence, it became clear that the absence of any system to bind judges and courts to earlier decisions violated constitutional precepts such as predictability, coherence, stability, equality and legal certainty, potentially inducing "social unrest" and "discrediting" judicial decisions (DONIZETE, 2017, p. 1467).

During a long evolutionary process, the culture of ignoring one's own judicial decisions on identical matters, as if each judge and court were not taking part in a system, gave rise to a judicial duty of self-reference which formed the basis for sustaining the precedent system as it was developed in Brazil (known as binding precedent).

To mitigate the damage resulting from the multiplicity of different constitutional decisions on identical cases, the SFC created a system of vertical precedents. The innovation was brought by the Constitutional Amendment nº 45/2004, which instituted the binding *súmulas*[5]. The constitutional amendment allows the

[3] From now, the Supreme Federal Court will be mentioned throughout this article only as SFC.

[4] In the Brazilian Constitutional system, the constitutional control is concentrated in the SFC, which is responsible for the process and ruling of the autonomous actions involving constitutional controversies (direct action of unconstitutionality, declaratory action of constitutionality, direct action of unconstitutionality by omission and allegations of disobedience of fundamental precepts, which are typical of the abstract constitutional control, as defined in article 103 of CF of 1988). SFC. Available in: <http://www2.stf.jus.br/portalStfInternacional/> Access in: Aug 19, 2018.

[5] "The S*úmula* is Brazil's concession to *stare decisis*. Since 1964, questions that have become firmly settled by the Supreme Court's decisions are published in capsule form, with a number assigned to each rule of law. These numbers of the *Súmula* are summarily cited to dispose of the issue in the future litigation. The S*úmula* can be modified, but on constitutional issues the votes

SFC to issue a statement of binding *súmula* that will aim at the validity, the interpretation and the efficiency of legal rules, whenever there is a conflict that engenders serious legal uncertainty and a relevant multiplication of lawsuits on an identical issue, which must be observed throughout the Judiciary and Public Administration, according to the article 103-A of the CF of 1988.

The Code of Civil Procedure of 1973 already acknowledged, albeit timidly, the force of precedents, but it was the reform of the Brazilian procedural law in 2015 that led the procedural culture of valuing precedents to its apex. The Code of Civil Procedure of 2015[6] assigned to judges and courts the legal duty of observance of a list of binding precedents[7], whose particularities will not be dealt with in this work, whose aim is to provide a brief clarification of selected concepts and their applicability in the Brazilian law.

In fact, the CCP of 2015 deals with several legal techniques, such as precedents, *súmulas* and distinguishing and overruling processes, without, however, making any distinction between them, which may cause some terminological confusion.

A precedent can be defined, in Câmara's words (2017, p. 367), as a "judicial decision, given in a prior case, which is used as the basis for the formation of another judicial decision, rendered in a subsequent case". At this point, it is worth noting that in common law, one who determines that a judicial decision is a precedent is the judge of the next case. In Brazilian law, the new procedural law already mentions which judicial decisions will have an effective binding precedent (CÂMARA, 2017, p. 377).

It is also important to note that only a certain part of the precedent has binding effectiveness. This is because the precedents are divided into two parts, the *ratio decidendi*, Latin expression that means "grounds for deciding" and *obiter dictum*, Latin expression that means "something said in passing" (TUCCI, 2004, p. 177). The *ratio decidendi* is the decisive foundation for the construction of the precedent and, therefore, it is the binding part of the decision. The *obiter dictum*, on the other hand, is not part of the central nucleus of the precedent and, therefore, have no binding efficacy, being endowed only with a persuasive character.

The new CCP also sets out the hypothesis where precedents may no longer be observed by judges and courts. However, the noncompliance with precedents must be tied to the use of distinguishing or overruling precedent techniques. In the first hypothesis, the judge must distinguish the precedent from the case that is sub judice, demonstrating that it is a situation whose outlines impose a different legal solution. In the second hypothesis, the judge must demonstrate that the precedent was surpassed due to the evolution of the society and/or the legal system and therefore it does not apply to the case that is sub judice.

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of at least 3 ministers are necessary to open the question". This definition of *Súmula* is presented by Kenneth Karst and Keith S. Rosenn in "Law and development in Latin America: A Case Book", 1975, p. 104.

[6] From now, the Code of Civil Procedure of 2015 will be mentioned throughout this article only as CCP of 2015.

[7] According to Article 927 of the CCP of 2015, the judges and courts will observe: the decisions of the Supreme Federal Court in concentrated control of constitutionality; the statements of binding *súmulas*; the decision in an incident of the assumption of competence or resolution of repetitive demands and in judgment of extraordinary and special repetitive resources; the statements of *súmulas* of the Supreme Federal Court in constitutional matter and of the Superior Court of Justice in infra constitutional matter; and the guidance of the plenary or special body to which they are attached.

Another technique widely used in the Brazilian legal system is the case law, which can be defined as a "set of judicial decisions handed down by the courts, establishing a consistent line of decisions on a given matter, allowing a understanding of how courts interpret a particular legal rule" (CÂMARA, 2017, p. 368).

When it comes to drawing a distinction between precedent and case law, Taruffo (2014, p. 141) explains that when referring to precedent, reference is made to a decision relating to a particular case, whereas when referring to caselaw, reference is made to a plurality of decisions relating to several sub judice cases. Thus, it can be concluded that a line of constant case law is based on the examination of a set of judicial decisions, and that each of these decisions can be considered, when analyzed individually, a precedent.

The Brazilian procedural law also determined that the courts should regulate their caselaw and maintain it in a stable, correct and coherent manner, as established in Article 296. Regarding the attributes of caselaw, some considerations deserve to be presented in this article. The stability of case law requires consistent and uniform lines of decisions on certain matters, which cannot be arbitrarily abandoned or modified so as to promote a fluctuation of legal doctrine and, consequently, compromise the principles of legal certainty, protection of trust and equality. The integrity of case law must be based on the history of decisions on a given matter. Therefore, the judge is required to respect everything that has been previously decided on the same matter in court.

Finally, the consistency of case law is based on equal treatment of similar cases. The legal duty of non-contradiction mitigates the multiplication of decisions made in a discretionary or arbitrary manner, since "it is not for the judge or court simply to opt for a decision that seems" better "or" fairer" (CÂMARA, 2017, p. 373).

Once a line of constant case law has been identified on a certain matter, the court that has signed it must issue a *súmula* statement, as established in Article 926, paragraph 1. The *súmula* statement, in its turn, consists of a summary of the dominant case law of a court, with explicit reference to the precedents that gave rise to it.

Even without detailing the whole system of precedents, we can observe the strong influence of common law and its techniques in Brazilian civil procedural law. Whilst there are contrary currents to the affirmation of the system of precedents, there is no doubt about the development of a culture of valuing precedents in Brazil.

Thus, we agree with Barroso (2018, p. 213) that the Brazilian system of precedents reinforced three essential values for the Judicial Branch: predictability, isonomy and efficiency. The legal duty of observance of a list of binding precedents already established by the courts increases the predictability of the law, guaranteeing greater legal certainty to the citizen. The application of the same solutions to similar cases reduces the production of conflicting decisions by the Judicial Branch and ensures that the same situation receives the same treatment, promoting isonomy. Finally, the respect for precedents allows the resources available to the judiciary to be optimized and used in a rational manner. If judges are obliged to follow the principles already developed by the courts, they will not waste time and other resources reconsidering problems that have already been resolved.

Although the system of precedents has been in force since 2015, it is still premature to conclude on its success. We believe that is a challenge for the Brazilian Judiciary and a great opportunity to strengthen the culture of valuing judicial precedents. The system of precedents will gradually be matured in the Brazilian civil procedural law, introduced into the routine of courts, judges, lawyers and citizens, and in parallel the difficulties and consequences of using common law institutes will arise.

Research and Study of Cooperative Law

Brazilian cooperative legislation has undergone an evolutionary process, of which the apex was Law 5.764/71, also known as the Cooperative Law[8]. That Law is the legal framework which regulates the National Cooperative Policy establishing the legal regime of cooperative societies. In addition to this law, other specific legislation was instituted with the purpose of regulating the legal relations established by certain cooperatives, such as Law 9.867/99, which deals with the creation and operation of social cooperatives; The Complementary Law 130/2009, which regulates the Credits Unions; and Law 12.690/2012, which deals with the organization and operation of work cooperatives.

The CF of 1988 upholds the cooperative movement in several articles with the purpose of assuring the autonomy of co-operative constitutions and operations and setting up mechanisms aimed at developing the cooperative movement. The Civil Code of 2002 also provides some aspects of cooperative societies, such as their characteristics and the legal nature of the responsibility of the cooperative members before the cooperative society.

Although Brazilian cooperative legislation establishes the specific rules of constitution, registration, organization, and dissolution of this peculiar societal model, it is not immune to the dynamic aspects of social and legal phenomena, as well as the other legal rules of Brazilian Law.

Therefore, we understand that the search for the solution of conflicts involving cooperatives will not be exhausted by cooperative legislation, since it is full of general and abstract commands that must be interpreted and applied by judges and courts. This arises from the interpretative techniques applicable to the legal rules, as established in the CF of 1988. In this context, judicial precedent conquered relevant space in the Brazilian legal system and created an impact on the cooperative movement as a tool for the research and study of Cooperative Law, as an autonomous branch of Law[9].

The advance of judicial precedents is also tied to the technological modernization of the Judicial Branch. The advent of globalization and the digital age, combined with the exponential increase in the judicialization of social conflicts and the facilitation of access to justice, have given rise to a new organizational culture in the Brazilian judicial structure.

With the purpose of seeking faster solutions and to unburden the courts, the Brazilian Judicial Branch has surrendered to the irreversible process of technological modernization. This understanding is further

[8] From now, the Law 5.764/1971 will be mentioned throughout this article only as Cooperative Law.
[9] See more at the references: ANDRIGHI, Fátima Nancy. 2003.

reinforced by the CCP of 2015 which requires the courts to carry out a wide dissemination of precedents, preferably through the internet, as established in Article 927, § 5.

For Tucci, disclosure of precedents is essential for lawyers to optimize the legal orientation of parties when there is a conflict of interests. For judges, "the science is indispensable so that they can respect the binding effectiveness of precedents, since without knowing them they will not be able to apply them to the sub judice cases" (TUCCI apud NEVES, 2017, 1408).

The technological modernization of the Judicial Branch allowed the development of tools for the research and study of Cooperative Law, through the virtual monitoring of judicial decisions that discuss Cooperative Law handed down in all the courts of the country by any interested party. The Brazilian cooperative movement has seen in these technological tools an opportunity to improve the mission of representation, defense, and promotion of cooperatives, which play a relevant role for the economic and social development of Brazil. We will describe, next, how the cooperative movement organizes itself to fulfill these skills.

The cooperative movement is represented by OCB System, composed of the Organization of Brazilian Cooperatives (OCB), National Confederation of Cooperatives (CNCoop) and National Cooperative Learning Service (Sescoop), each with a specific goal, but all focused on the development of cooperatives. The OCB was founded in 1969 at the Fourth Brazilian Cooperatives Congress to represent Brazilian cooperatives as required by Article 105 of the Cooperative Law.
The Sescoop was created only in 1999, with the purpose of education regarding the cooperative movement, social promotion and monitoring. Finally, in 2005, the CNCoop was created for union representation. The OCB System is represented throughout Brazil through its units which are present in each of the 27 states. These organizations contribute to the development of local cooperatives, which is often the only alternative method of income distribution, job creation and social inclusion in several municipalities.
According to data from the OCB System of 2016, there are more than 6.6 thousand cooperatives running in 13 branches of economic activities[10], which are developed in rural and urban environments and are transformed into products and services. Surpassing 13.2 million cooperative members, the Brazilian cooperatives also generate around 377 thousand formal jobs. In 2017, cooperative sales reached a total value of US$6.1 billion in 147 counties[11].

Among the actions carried out by the OCB System, addressed in this work are the use of binding precedents, and the monitoring and disclosure of judicial decisions to assist the Superior Courts. The Superior Courts have begun to use the elaboration of strategies of action as a tool within the system of binding precedents established by the CCP of 2015. Therefore, the new procedural law attributed binding effectiveness, vertical and horizontal, to the decisions passed by the Superior Courts set out in Article 927 and so ensured equality and legal certainty, according to the *stare decisis* doctrine derived from the common law. Through this tool, the OCB intensified its actions before the Judicial Branch in lawsuits, whose outcomes can affect the lives of millions of Brazilian cooperative members because of their binding effectiveness.

[10] The Brazilian cooperative movement is running in 13 economic sectors: agribusiness, consumer, credit, education, special, housing, infrastructure, mineral, production, healthcare, worker, transport, tourism, and leisure. OCB System. Available in: <http://www.ocb.org.br>. Access in: Aug 15, 2018.
[11] OCB System. Available in: <http://www.ocb.org.br>. Access in: Jun 24, 2018.

To exemplify this action, we can mention the participation of the OCB System in the judgment of the Brazilian Forest Code by the SFC, which was amended by Law 12.651/2012 and generated many debates and controversies in the Judicial Branch with the potential impact on agribusiness. To ensure that the legislative advances for the productive sector achieved by the new Forest Code did not lose effectiveness through its interpretation by the Judicial Branch, during the years 2016 and 2017, the OCB System monitored another thousand lawsuits, especially in the State Court of Justice of São Paulo and Minas Gerais. In addition, it served as *amicus curiae*[12] in four Direct Actions of Unconstitutionality (ADIs4901, 4902, 4903, and 4937) in progress in the SFC, in order to contribute to the understanding of the reality of thousands of families engaged in agribusiness. The SFC concluded the trial in 2018 with the declaration of constitutionality of most articles, maintaining the balance between protecting the environment and agribusiness[13].

Another example of institutional action is the defense of cooperative acts carried out by cooperative societies. The OCB System has acted as an *amicus curiae* in two lawsuits in the SFC (REs 672.215 and 597.315), in which judgments are still pending. The aim is to assist the ministers in the correct understanding of the concept of tax treatment appropriate to the cooperative act.

The importance of the OCB System's actions in these lawsuits with general repercussions lies in the binding power of the *ratio decidendi* of decisions, which will have an indiscriminate impact on all Brazilian cooperatives, since they will be applied to individual or collective processes that deal with similar matters, as well as to future cases, with the exception of the hypothesis of revision of the legal interpretation, as established in Article 986 of the CCP of 2015.

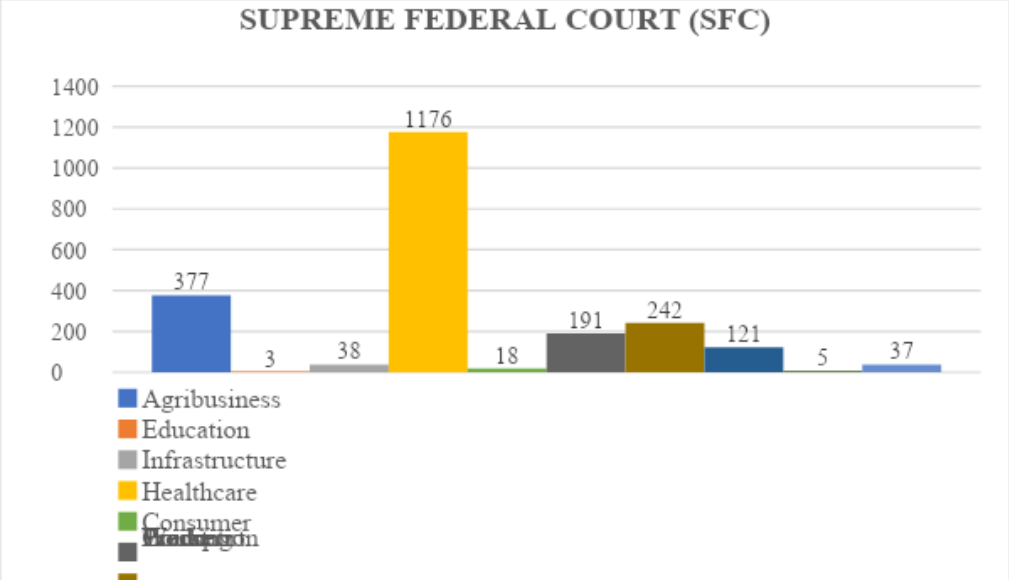
Regarding the monitoring and disclosure of judicial decisions carried out by the OCB, we believe that this work was only possible due to the technological modernization of the Brazilian judicial structure, since it allows the investigation of decisions in the Courts websites, from the combination of varied search criteria such as keywords, legislation, date of judgment and type of decision, for example.

In order to demonstrate this monitoring work carried out by the OCB System, we will present, in a series of graphs, relevant statistical data from researches conducted in the courts. The criteria applied in these surveys are restricted to the decisions collection, from June 2016 to June 2018, in two Superior Courts, SFC and Superior Court of Justice (SCJ)[14], and in allState Courts of Justice present in Brazil, using the "cooperative" keyword[15].
The studies carried out in the Superior Courts indicate that approximately 40.000 decisions were mapped out, of which 23.468 were analyzed, of which 2.208 were handed down in the SFC and 21.260 were

[12] As established in Article 138 of the CCP of 2015, the judge has power to admit the participation of *amicus curiae* in the process in order to assist the judge when there is relevance of the issue; the specificity of the issue raised in the lawsuit; and the social impact of the dispute.
[13] OCB System. Available in: <http://www.ocb.org.br/noticia/21018/stf-conclui-julgamento-do-novo-codigoflorestal>. Access in: Jun 24, 2018.
[14] From now, the Superior Court of Justice will be mentioned throughout this article only as SCJ.
[15] Brazilian Judiciary System: The Supreme Federal Court, highest judicial body in Brazil, with a seat in the Federal Capital, Brasília/Distrito Federal, has jurisdiction over the entire national territory. The Judicial Power is also composed by the following bodies: National Council of Justice; Superior Court of Justice; Federal Regional Courts and Federal Judges; Labor Court; Regional Labor Courts and Judges; Electoral Court; Regional Electoral Courts and Judges; Military Court; Military Courts and Judges; Courts and Judges of the States, the Federal District and the Territories. SFC. Available in:<http://www2.stf.jus.br/portalStfInternacional/cms/verPrincipal.php?idioma=en_us> Access in: Aug 19, 2018.

passed in the SCJ. Chart 1 presents the SFC figures, with emphasis on decisions involving cooperatives in the healthcare (1176), agribusiness (377) and credit (242).

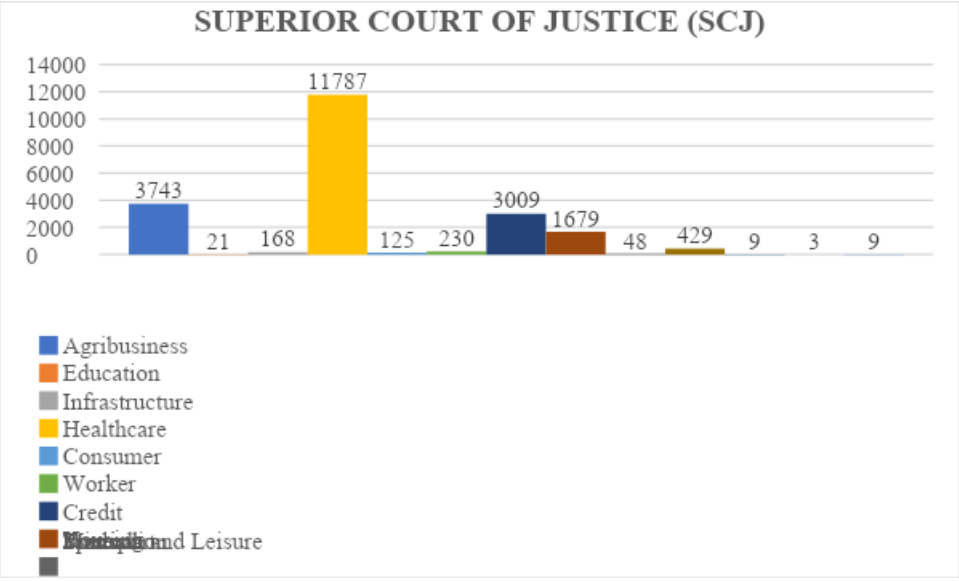
Chart 1: Figures of cooperatives in the SFC, from June 2016 to June 2018.



Source: OCB System, 2018

The SCJ ruled on matters involving cooperatives of all branches, with emphasis on the number of healthcare (11.787), agribusiness (3.743), credit (3.009) and housing (1.679), according to SCJ figures presented in Chart 2 below.

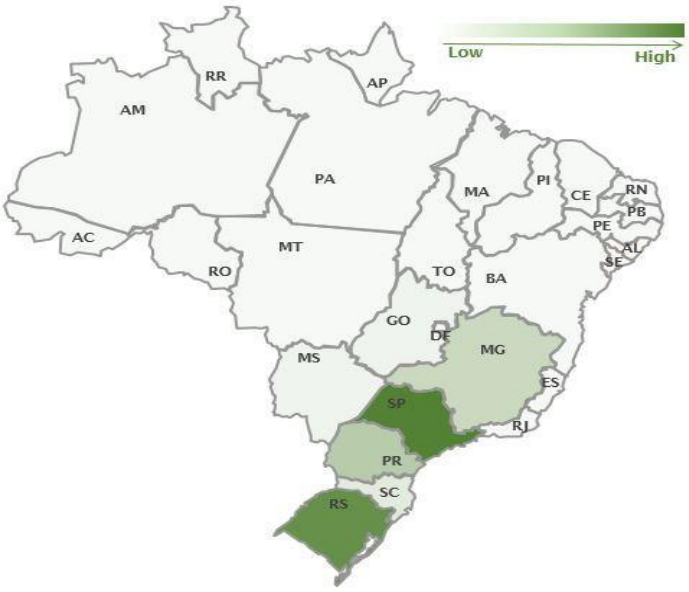
Chart 2: Figures of cooperatives in the SCJ, from June 2016 to June 2018.



Source: OCB System, 2018

The mapping carried out by the OCB System also covered about 80.000 decisions handed down in the State Courts of Justice, of which 2.617 were made available. In Chart 3, it is possible to verify which are the State Courts of Justice that most discuss matters involving cooperatives, with emphasis on São Paulo, Rio Grande do Sul, Paraná and Minas Gerais, which together amount to almost 70.000 decisions.

Chart 3: Cooperatives in the State Courts of Justice



	UF	DATE
1	BA	753
2	PE	387
3	ES	298
4	CE	734
5	RJ	850
6	SE	38
7	SP	26.390
8	AC	158
9	MA	33
10	RS	24.023
11	PA	284
12	GO	1.600
13	RO	156
14	MS	1.674
15	SC	3.716
16	RN	116
17	PR	10.272
18	DF	374
19	MG	7.330
20	PB	576
21	TO	486
22	AL	356
23	AM	362
24	PI	8
25	MT	241
26	AP	14
27	RR	163
TOTAL		**81.392**

Source: OCB System, 2018

In addition to statistical data, the work of monitoring and disclosure of judicial decisions carried out by the OCB System is broken down into other actions, including the identification of the main issues discussed in the courts involving cooperatives and the disclosure of decisions favorable to cooperatives through a newsletter called Cooperatives in the Courts.

From the information collected, we could identify that the most discussed issues in the Judicial Branch involve tax matters and corporate matters. These issues are often discussed because of the lack of knowledge of Cooperative Law by society and by the Judicial Branch itself.

This information is a real tool as it contributes to the drafting of action plans as well as the convergence of the organization's efforts to places and people who need legal and institutional assistance. They also allow the OCB System to act to ensure that the peculiarities of cooperative societies are understood and contemplated in the formulation of legislation and public policies.

The disclosure of favorable decisions to cooperatives through the newsletter Cooperatives in the Courts has been used as an important working tool and support for lawyers in the development of procedural strategies. Since 2016, the newsletter has issued more than 2.617 favorable decisions in cooperative lawsuits with the goal of informing advocates about the cooperative panorama in the Judicial Branch, allowing the anticipation of procedural strategies, due to the acknowledgment of the predominant understanding in the courts.

From the foregoing considerations, we believe that the procedural reform tied to the technological modernization of the Brazilian judicial structure contributes to the progress of research and study of Cooperative Law, creating opportunities to increase knowledge of, and influence by, the sector within the Judicial Branch through procedural and institutional action strategies.

Final considerations

From the perspective of Brazilian experience, this article aims to demonstrate that the use of judicial precedent as a tool for research and study of Cooperative Law was a logical consequence of the evolution of the legal reasoning of the traditional civil law and common law systems, which resulted in the approximation between these two systems.

The advent of constitutionalism and the spread of the doctrine of precedents and *stare decisis* of the common law tradition are factors that allowed the rapprochement between the traditions and the emergence of legal systems of a hybrid nature in several countries.

Although Brazil is affiliated with the civil law tradition, there is no doubt that the contemporary civil law judge resembles the common law judge when he interprets legal rules and fills gaps left by the Law's general and abstract commands so as to resolve a case that is sub judice.

The strong influence of the culture of valuing judicial precedents in the activity of contemporary jurisdiction resulted in the reform of the Brazilian procedural law and in the affirmation of a system of precedents, whose repercussion in the Brazilian scenario was intensified as a result of the process of technological modernization of the Brazilian judicial structure.

Considering this, the OCB System acts in favor of cooperatives using the judicial precedent as a tool for the research and study of Cooperative Law in the development of strategies of procedural and institutional action in pursuit of the strengthening of the cooperative movement in Brazil.

REFERENCES

ANDRIGHI, Fátima Nancy. A autonomia do direito cooperativo. In: KRUEGER, Guilherme (Coord.). **Cooperativismo e o novo código civil.** Belo Horizonte: Melhoramentos, p. 49-57, 2003.

BARROSO, Luís Roberto. **Um outro país: transformações no direito, na ética e na agenda do Brasil.** Belo Horizonte: Fórum, 2018.

BARROSO, Luis Roberto. Neoconstitucionalismo e constitucionalização do Direito (O triunfo tardio do direito constitucional no Brasil). **Revista de Direito Administrativo**, Rio de Janeiro, v. 240, p. 1-42, abr. 2005.

BRASIL. Constituição da República Federativa do Brasil de 1988. Disponível em: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm>. Acesso em:

7 jun. 2018.

___. Lei n° 5.764, de 16 de dezembro de 1971. Disponível em:

<http://www.planalto.gov.br/ccivil_03/LEIS/L5764.htm>. Acesso em: 7 ago. 2018.

___. Lei nº 13.105, de 16 de março de 2015. Disponível em: <http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13105.htm>. Acessoem: 7 jul. 2018.

CÂMARA, Alexandre Freitas. **O novo processo civil brasileiro**. São Paulo: Atlas, 2017.

KARST, Kenneth L.; KARST, Kenneth L.; ROSENN, Keith S. **Law and Development in Latin America: A Case Book**. Univ of California Press, 1975.

NEVES, Daniel Amorim Assumpção. **Manual de Direito Processual Civil – Volume Único**. 9 ed. Salvador: JusPodivm, 2017.

TUCCI, José Rogério Cruz e. **Precedente judicial como fonte do Direito**. São Paulo: Revista dos Tribunais, 2004.

TARUFFO, Michele. Precedente e jurisprudência. Trad. Chiara de Teffé. **Civilistica.com**. Rio de Janeiro, a. 3, n. 2, jul.- dez.2014.

WAMBIER, Teresa Arruda Alvim. Estabilidade e adaptabilidade como objetivos do direito: civil law e common law. **Revista de Processo**, São Paulo: RT, v. 172, ano 34, jun. 2009.

THE PRINCIPLES OF EUROPEAN COOPERATIVE LAW AND THEIR IMPACT ON FUTURE LAW-MAKING ON COOPERATIVES. THE CASE OF THE NETHERLANDS

Dr. Ger J.H. van der Sangen[1]
Tilburg Law School
Netherlands

1. Introduction

The concept of the cooperative as an organizational model has gained renewed attention from practioners, policymakers, legislators and academia over the last decades, culminating in the United Nations' proclamation of 2012 as The Year of the Cooperative. After years of relative silence on cooperative law, questions were raised about the adequacy of the legal infrastructure of cooperatives. Did the existing legal frameworks facilitate and foster the creation of cooperatives or are they hampering the establishment and growth of cooperatives? Legal aspects of cooperatives have been paid more and more attention, notably in the field of business organizational law, tax law and competition law. Also new challenges and innovations in the use of the concept of the cooperative lead to a necessity to adjust legal rules on cooperatives, for example with regard to renewable energy cooperatives, credit unions and the use of cooperatives in the platform economy. These events were accompanied by the reemergence of the cooperative movement and the creation of social economy initiatives, which have been actively promoted by the European Union and have led in several member states to concrete policy instruments, legal measures and inducements to promote businesses in the social economy.[2]

A common denominator in all of these developments is the pivotal and quintessential question of what a cooperative is. In fact, although the cooperative both as an organizational form and as a legal construct has existed for more than 150 years – since the establishment of the Rochdale Equitable Pioneers in 1844 –, the legal debate on the specific nature and identify of the cooperative vis-à-vis investor-owned firms is still ongoing. A number of more recent publications in this field have already advanced our insights in the matter.[3] Yet, it appears that policymakers, legislators and in some cases the judiciary lack a proper understanding of the rationale of the concept of the cooperative and its legal nature. This article will demonstrate this claim by examining the cooperative law in the Netherlands. I will compare and contrast the key features of cooperative law in the Netherlands with *'The Principles of European Company Law'* (hereinafter: PECOL). This article submits that the PECOL will have an

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[1] Dr Ger J.H. van der Sangen is an Associate Professor Company Law and Securities Law at Tilburg Law School, Department Business Law. This articles builds on the autor's presentation at *The 2nd International Forum on Cooperative Law*, in the session on 'The harmonization and unification of cooperative law at national, regional and international level' , Athens 26 – 28 September 2018

He would like to express his gratitude to all the participants during this session for sharing their insights and discussions.

[2] See for an elaborative overview T.J. van der Ploeg e.a. (eds.), *Civil Society in Europe. Minimum Norms and Optimum Conditions of its Regulation*, Cambridge University Press, Cambrigde 2017.

[3] See for example A. Fici, 'The Essential Role of Co-operative Law and Some Related Issues', in: J. Mitchie e.a. (eds.), *The Oxford Handbook of Mutual, Co-operative, and Co-owned Business*, Oxford University Press, Oxford 2017, p. 539-549.

important impact on pinpointing and developing the characteristics of the specific nature and identity of the cooperative vis-à-vis investor-owned firms and are useful guidelines for legislators in developing new cooperative laws.

The outline of this article is that in part 2, I will describe the PECOL-project focusing on its objective and its methodology. In part 3, I address the question how the PECOL fit into the existing framework of legal principles and norms of European Cooperative Law. In part 4, I will discuss the PECOL with regard to the definition and objectives of cooperatives, the cooperative governance, the cooperative financial structure, the cooperative audit and the cooperation among cooperatives, following the five core building blocks of the PECOL. While addressing these topics, I will compare and contrast the PECOL with the current state of affairs with regard to cooperative law in the Netherlands.[4] Part 5 concludes.

2. The PECOL-project

2.1 General remarks

The PECOL are the result of the research project of the Study Group on European Cooperative Law and as such presented in the book *Principles of European Cooperative Law. Principles, Commentaries and National Reports'* by Fajardo, Fici, Henrÿ, Hiez, Meira, Münckner & Snaith (2017).[5] The starting point of drafting the PECOL was the cooperative law statutes of six member states. In alphabetic order: Finland, France, Italy, Germany, Portugal, Spain and the United Kingdom. Also reference is made to the SCE Statute[6] as a restatement of European Cooperative Law reflecting a certain *acquis communautaire*. While taking this approach, the Study Group has created the foundations to determine common principles and legal norms that generally underlay national cooperative law statutes. The question may arise whether the selected sets of cooperative legislation reflect cooperative law of all member states of the European Union. In this respect, the drafting of PECOL has been an ambitious project given the fact that cooperative legislations in the EU are highly path-dependent.[7] However, drafting the PECOL is the first project to produce a more comprehensive and detailed set of legal principles and norms that legislators, co-operators, policymakers and scholars could use to discuss the essentials and basic legal features of the cooperative as a legal business form. The PECOL could also

[4] See for a description of Netherlands' cooperative law: G.J.H. van der Sangen, 'Cooperative Law in the Netherlands', in: D. Cracogna, A. Fici & H. Henry (eds.), *International Handbook of Cooperative Law*, Berlin: Springer Verlag 2013, pp. 541-561.

[5] G. Fajardo et.al. (2017), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge – Antwerp – Portland: Intersentia 2017, firstly reviewed by G. Miribung, in: *International Journal of Cooperative Law*, Issue I, 2018, pp. 191-197 (www.iuscooperativum.org).

[6] Council Regulation (EC), No 1435/2003 of 22 July 2003 on the Statute of a European Cooperative Society (SCE), OJ L 207/1 of 18 August 2003, entered into force as of 18 August 2006. The Regulation is accompanied by Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, OJ L 207 of 18 August 2003.

[7] Vide the evolution of the SCE-Statute in the 2010 Euricse Report on the implementation of the SCE-Statute and G.J.H. van der Sangen, *Support for Farmers' Cooperatives. An EU Wide Comparative Analysis of Legal Aspects of agricultural cooperatives*, Wageningen University 2012 and G.J.H. van der Sangen, 'How to Regulate Cooperatives in the EU? A Theory of Path Dependency', *Dovenschmidt Quarterly*, December 2014, pp. 131-146.

provide the building blocks to draft model statutes as an inspiration how to set-up cooperatives. The PECOL apply to two types of cooperatives: the traditional mutual cooperative and the emerging general interest cooperative. In this respect, there is a demand for further research into the question whether two set of principles and model statutes are required: one for the traditional mutual cooperatives and one for the new wave of general interest cooperatives. In this article, the idea is supported that – while the history of top-down law-making on cooperatives in the EU has contributed to the complexity of cooperative laws with path-dependent differences – the PECOL have the potential of overcoming the existing path-dependency on cooperative law-making.

2.2 Methodology

As said above, the starting point of the PECOL are the cooperative legislations of six EU member states that might be representative for cooperative law in the EU. Also, the Study Group referred to the SCE Statute as a restatement of European Cooperative Law reflecting a certain *acquis communautaire*. The question may be raised whether the specific selection of cooperative laws by the Study Group and the addition of the SCE Statute as a point of reference represent 'cooperative law' of *all* member states of the European Union. The authors acknowledge that the search for common principles in this respect has been a highly path-dependent activity and – to a certain extend – arbitrary. Earlier research showed that the harmonization of cooperative laws in the EU or its approximation by means of the introduction of the SCE Statute has been rather trivial.[8] However, from a comparative perspective the approach of the Study Group is justified since their objective is not to design *ex novo* an ideal prototype legal structure of cooperative legislation but rather exploring and identifying common principles that underlie cooperative law that could be used as guidelines for future law-making. The PECOL itself are not by any means intended to create cooperative laws taking over the role of the legislator. At best, according to the Study Group, the PECOL are soft law. Also, in my view, the selected jurisdictions reflect the diversity of the present legal frameworks of cooperative law in the EU, since families of legal traditions in cooperative law-making are taken into account. In this respect, the Study Group used a functional approach to comparative law with regard to exploring and identifying PECOL, however based on the doctrinal descriptions of cooperative law in the selected EU member states.[9]

2.3 Objectives

Reading the PECOL and their commentaries, one might wonder what the societal necessity exactly was for drafting a set of Principles of European Cooperative Law. Were there shortcomings in applying cooperative law in practice that needed to be addressed urgently? The Study Group has drawn-

[8] See the 2010 SCE-Statute Evaluation Report, *o.c.*, footnote 7.

[9]See R. Michaels, 'The Functional Method of Comparative Law', in: R. Reimann & R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxford 2018, p. 340-380. According to R. Michaels, functionalist comparative law is factual as it focuses not on rules as such but on their effects, not on doctrinal structures and arguments, but on events. As a consequence, legal systems are compared by considering their various judicial responses to similar situations. The functionalist comparative law combines its factual approach with the theory that its objects must be understood in the light of their functional relation to society. The functionality of law itself serves as means of comparison meaning that institutions, both legal and non-legal, even doctrinally different ones, are comparable if they are functionally equivalent, if they fulfill similar functions in different legal systems. See for a functional approach to corporate law R. Kraakman et.al., *The Anatomy of Corporate Law. A Comparative and Functional Approach*, third revised edition, Oxford University Press, Oxford 2017.

up principles of European Cooperative Law that are primarily restricted to business organizational law aspects. Tax law, competition law, the role and involvement of employees in cooperatives, for example, have not been addressed. According to the Study Group, these questions 'are (…) very important, but depend so much on national jurisdictions that it is impossible, so far, to draw general conclusions.'[10] Although the literature demonstrates that cooperative law statutes of the EU member states are path-dependent as well,[11] there is common ground to identify PECOL from a business organizational law point of view. At the same time, we witness an undeniable new wave of appreciation of the cooperative in the EU triggered by the economic crisis and the policy agendas of global and European institutions, like the United Nations, the International Labour Organisation, the International Cooperative Alliance, the European Commission and the Court of Justice of the EU. In the Paint Graphos-case,[12] the CoJ EU specifically referred to the principles of cooperative law, deriving them from ILO Recommendation No. 193, the 1995 ICA Principles, the Communication of the European Commission on the promotion of Cooperatives and the Preamble of the SCE-Statute. We have to bear in mind that the Paint Graphos-case was a specific tax case and the social dimension of the cooperative and the concept of solidarity and mutuality were used by the court to construct a line of arguments in which the tax treatment of this specific type of cooperative was not considered to interfere with the EU rules for state aid. While doing so, the court laid down the legal principles for mutual cooperatives that operate not solely based on economic rationales and do not act as pure economic profit centres, but include elements of solidarity and mutuality element.[13]

That is not to say that in other fields of law, legislators fully grasp the legal nature and identity of the cooperative. For example, EU competition law and its application by the European Commission and the CoJ EU also reflects on the nature of cooperatives, yet not in a particularly facilitating way. Only for agricultural cooperatives are cooperative enterprises treated with some leeway under strict conditions, but cooperatives are not generically exempted from the application of competition law, irrespective their different character and identity from investor-owned firms. The starting point in EU competition law is that cooperatives are viewed as enterprises like any other that are able to influence competition.[14]

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[10] Fajardo et.al. (Eds.), *o.c.*, footnote 5, p. 5. In this respect, a recent study concluded with regard to agricultural cooperatives that these cooperatives in the 28 EU member states did not encounter significant legal problems establishing and maintaining cooperatives from a business organizational law point of few. The problems agricultural cooperatives encountered where mainly found in the field of taxation and the application of national and European competition law. In both tax law and competition law, because of the fact that the specific legal nature and identity of the cooperative and its characteristics vis-à-vis investor owned firms are not (adequately) taken into account by the legislator. See G.J.H. van der Sangen, *Support for Farmers' Cooperatives. An EU Wide Comparative Analysis of Legal Aspects of agricultural cooperatives*, Wageningen University 2012.

[11] G.J.H. van der Sangen, 'How to Regulate Cooperatives in the EU? A Theory of Path Dependency', *Dovenschmidt Quarterly*, December 2014, pp. 131-146.

[12] Court of Justice EU 8 September 2011, Joint Cases C-78/08 (Ministero dell'Economia e delle Finanze en Agenzia delle Entrate versus Paint Graphos Soc. coop. arl), C-79/08 (Adige Carni Soc. coop. arl, in liquidation versus Agenzia delle Entrate en Ministero dell'Economia e delle Finanze (C-79/08) and C-80/08 (Ministero delle Finanze versus Michele Franchetto).

[13] See for the requirements of the cooperative based on solidarity and mutuality the analysis of A. Fici, 'The European Cooperative Society', in: D. Cracogna et.al. (eds.), *International Handbook of Cooperative Law*, Springer Verlag, Berlin 2013, pp. 122-125. See also G.J.H. van der Sangen, 'De rol van principles in het coöperatierecht' (The Role of Principles in Cooperative Law), *Tijdschrift voor Ondernemingsbestuur* 2019-2, pp. 36-43.

[14] See Van der Sangen, *Support for Farmers' Cooperatives Report* 2012, p. 30-39 and A. Gerbrandy & S. de Vries, *Agricultural Policy and EU Competition Law. Possibilities and Limits for Self-Regulation in the Dairy Sector*, Eleven International Publishing, The Hague 2011, as well as the European Commission, DG Competition, *The interface between*

Since the focus of the PECOL is on business organisational law, it might be useful to elaborate on the objectives of business organisational law in general and to examine whether these objectives are at odds with the objective of cooperatives and cooperative law. The objectives of business organizational law listed below are well founded in the *law & economics* literature[15] and have been the dominant approach of the EU and national legislators on listed companies and private companies limited by shares. The main objective of business organisation law according to the law & economics literature is to facilitate entrepreneurship by providing off the rack legal business forms, in order to lower transactions costs in setting-up and maintaining a legal business entity, to lower the costs of solving potential agency problems, to offer default rules in case end-users are not in the position to ex ante contract for optimal provisions, and to safeguard the protection of minority members and other stakeholders as well as to prevent the abuse of the legal business form. The underlying objective of this approach of business organizational law-making is efficiency, lowering the internal and external costs of business organizations.

However, designing business organisation law for cooperatives as a legal business form from a transaction and agency costs perspective could be too narrow an approach to grasp the potential of cooperation in a cooperative since efficiency and profit-seeking are not an objective in itself but a means to an end in a cooperative. Cooperatives are about efficiency on the one hand and solidarity and mutuality at least between members on the other. It is in this respect that the Study Group choose a different approach on 'law-making' while drafting the PECOL. The question whether cooperative laws should mandate to encapsulate other interests than the pure economic has been answered by the Study Group confirmatively. Although the ultimate decision to encapsulate other interests than pure economic interests of its members is for the incorporators of the cooperative to decide, the cooperative and cooperative law in view of the Study Group are normative concepts that are reflected in the scope of the PECOL.

The scope of the PECOL is the traditional, economic mutual cooperative as well as the cooperative with a more societal objective. The PECOL reflect the operations of the first type of cooperatives, notably producer and supply cooperatives of entrepreneurs and farmers or even large cooperative banks. However, the PECOL contain the same aspiration as the 1995 ICA Principles and are based on the principles and values of the ICA. In practice, not all producer cooperatives adhere to these ICA Principles, because not only are the ICA Principles not legally binding for these cooperatives, but also from an economic point of view, they are not considered in all circumstances efficient for the enhancement of the performance of the cooperative and the income position of the *existing* members.

The Study Group did not draft principles specifically designed for the cooperative with a societal objective, - e.g. for general interest cooperatives – setting them apart from the case of the mutual or entrepreneurial cooperative. This choice is justifiable, for two reasons. Drafting principles specifically for general interest cooperatives leads to additional legal questions of demarcation and definition vis-à-vis associations. The second reason is that, since the PECOL do not mandate but facilitate cooperatives with

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EU competition policy and the Common Agricultural Policy (CAP): Competition rules applicable to cooperation agreements between farmers in the dairy sector, working paper, Brussels 16 February 2010, pp. 1-31 and the European Commission, DG Competition, *How EU Competition Policy Helps Dairy Farmers in Europe*, Questions & Answers, 16 February 2010.

[15] R. Kraakman et.al., *The Anatomy of Corporate Law. A Comparative and Functional Approach*, third revised edition, Oxford University Press, Oxford 2017, J.A. McCahery & E. Vermeulen, Corporate Governance of Non-Listed Companies, Oxford University Press, Oxford 2008 and P. Essers et.al. (eds.), *Reforming the Law on Business Organizations. Back to Basics in Business Law and Tax Law*, Eleven International Publishing, The Hague 2011.

a societal objective, the PECOL leave the autonomy of the incorporators of the cooperative untouched, save for those member states were the national cooperative law already mandates that all cooperatives must have a social dimension (which is the case in Italy and Portugal). Whether a cooperative has an entrepreneurial, income generating, pure economic, profit generating objective or a societal objective, is left to the freedom of association and the autonomy of the incorporators. If the incorporators choose the latter objective, of course, the principles could function as principles and best practices while at the same time there is already a legal infrastructure available to treat this type of cooperative with an articulated societal objective differently than the pure entrepreneurial cooperative. I would like to refer to legislation in Belgium and Italy as well as to the opening that the *Paint Graphos*-case provides for tax incentives. On the other hand, it is not for the benefit of the members of an entrepreneurial cooperative – with an articulated economic function in their bylaws – to be in any way mandated to adhere to the 1995 ICA-principles or the principles at hand. If all cooperatives were legally defined as not-for-profit – like the PECOL explicitly do –,[16] the entrepreneurial cooperative would be left out of the equation and this would not contribute to the acceptance of the PECOL in cooperative practice, for it places the entrepreneurial cooperative outside the scope of the PECOL.

This is not to say that a cooperative could not apply the principles, which members even can rely upon in court if a cooperative has encapsulated them in its bylaws or if they function as self-regulatory codes of principles and best practices, similar to corporate governance codes. If a cooperative complies with them – at least in the Netherlands –, members can rely upon them in court and they become 'the law' for the cooperative, alongside to cooperative law, the bylaws and passed resolutions of the competent bodies.[17]

Overall, the question remains what role the PECOL have or should have in relation to the function of business organizational law of cooperatives. Is it primarily to facilitate cost-efficient business forms and secondly to address minority and creditor protection (like in the dominant law & economics approach) or do the PECOL play a role in imposing top-down societal standards (the more normative approach)? Who is the addressee of the principles? What are the incentives for the legislature to consider these principles while reforming their national cooperative law? In this respect, it is worth mentioning that the European Commission is not planning further action in the field of revising the SCE Statute at this moment.

The Study Group has elaborately explained what the reasons are to introduce PECOL.[18] These reasons are compelling and – in my view – must be read in conjunction to each other. The Study Group underlines that, although the 1995 ICA Principles are broadly accepted as guidelines for how cooperatives could (or: should) operate and to a certain extend already express the specific characteristics and modus operandi vis-à-vis investor owned firms, the ICA Principles are too general and too descriptive to be used as legal norms and do not provide legal principles, norms and rules. Second, as already pointed out above, the existing legislation is highly path-dependent, lacking a proper overall definition of the cooperative as a legal business form and its specific legal identity. In this respect, the Study Group refers to the

[16] See the comments in paragraph 4.1 of this article.

[17] Of course, in the hierarchy of sources of cooperative law, the applied principles in the bylaws may not contravene the existing statutory cooperative law.

[18] Fajardo et.al. (eds.), *o.c.*, footnote 5, p. 8-15.

phenomenon of 'companisation of cooperative law'.[19] Third, the ICA Principles need to be translated into normative legal principles to create a body of cooperative law as an autonomous field of law. [20] The ultimate objectives of the PECOL are, according to the Study Group, to help to pinpoint the legal identity of cooperatives distinct from 'companies' (investor owned firms), to provide a legal framework or pattern for other enterprises, notably in the social economy, and to provide a tool to enter into academic debate.

3. PECOL and the Framework of European Cooperative Law

One of the quintessential ideas behind the PECOL is that the PECOL fill in a gap between general cooperatives principles on the one hand and concrete legal norms and rules for cooperatives as a specific legal business form distinct from 'companies' on the other. At the top of the hierarchy of sources of European Cooperative Law are the 1995 ICA Principles of Values as well as ILO Recommendation No. 193. ILO Recommendation No. 193 mandates members of the ILO to adhere to the ICA-Principles and Values, [21] but also to take concrete steps to implement an adequate legal framework for cooperatives bases on the ICA Principles and Values.[22] Although the SCE Statute was not very successful in approximating the national cooperatives laws of the EU member states and its harmonizing effect was rather trivial, the SCE Statute also embodies the principles and values of the ICA Principles.[23] However, despite its character of directly binding legal rules as a regulation, the SCE Regulation needed implementation into national cooperative laws. Apart from that, the SCE Statute does not apply to cooperatives that are not established as an SCE. At best, in case a cooperative has been established under a national cooperative law, the SCE Statute could be used by the judiciary as a point of reference to interpret the national cooperative law, the bylaws and resolutions of the cooperative, as was the case in *Paint Graphos*.[24] However, the PECOL could also be used – within the existing hierarchy of sources of cooperative law – as a tool or framework for incorporators and members to design and adjust the articles of association or bylaws of the cooperative. Also they could be used for designing cooperative governance codes.[25] The future will establish where the PECOL will fit in the hierarchy of sources of cooperative law. The aim – of course – is that the PECOL should evolve into generally accepted legal

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[19] D. Hiez, 'Introduction', in: Fajardo et.al. (eds.), *o.c.*, footnote 5, p. 13. See also H. Henrÿ, 'Trends and Prospects of Cooperative Law, *International Handbook of Cooperative Law*, 2013, p. 809.

[20] H. Henrÿ, 'Trends in Cooperative Legislation: What Needs Harmonizing?', *Journal of Research on Trade, Management and Economic Development*, Vol. 5, Issue 1(9), 2018, p. 7-16.

[21] The addressees of the ILO Recommendations are the countries affiliated to the ILO. See H. Henrÿ, 'Public International Cooperative Law', *International Handbook of Cooperative Law*, Springer Verlag, Berlin 2013, p. 65-88.

[22] Article 6, ILO Recommendation No. 193: 'A balanced society necessitates the existence of strong public and private sectors, as well as a strong cooperative, mutual and the other social and non-governmental sector. It is in this context that Governments should provide a supportive policy and legal framework consistent with the nature and function of cooperatives and guided by the cooperative values and principles (…).

[23] Preamble 10 to the SCE Statute.

[24] Court of Justice EU 8 September 2011, Joint Cases C-78/08 (Ministero dell'Economia e delle Finanze en Agenzia delle Entrate versus Paint Graphos Soc. coop. arl), C-79/08 (Adige Carni Soc. coop. arl, in liquidation versus Agenzia delle Entrate en Ministero dell'Economia e delle Finanze (C-79/08) and C-80/08 (Ministero delle Finanze versus Michele Franchetto).

[25] Both the UK and the Netherlands are in the process of adjusting the existing governance codes for cooperatives.

principles of cooperative law with legal merit on their own, like the principle of good faith, duties of care etc.

4. Discussion on the PECOL[26]

4.1 Definition and objectives of cooperatives (Chapter 1)

A cooperative is defined as a legal person that carries on any economic activity *without profit* as the ultimate purpose (article 1.1.1.). 'Profit' as the ultimate purpose means making profit mainly for the payment of interest, dividends or bonuses on money invested or deposited with, or lent to, the cooperative or any other person (article 1.1.2). This principle intends to set the cooperative apart from investor-owned firms barring refunds or distribution on capital invested.

However, it is not clear how the principle relates to those cooperatives that have designed structures of self-financing to pay to members but also to investors a return on their investment in the equity of the cooperative. Cooperatives are searching for innovative ways to attract equity,[27] while maintaining the primary function for their members in the patronage relationship. All these innovative techniques involve the establishment of a patronage relationship based on market prices, which results in a profit for the cooperative. Members are commonly obliged or invited to provide additional equity funding to the cooperative and their equity stake is commonly related to the volume of their patronage. That will subsequently be the basis for the payment of a dividend. Although not a refund in the traditional way, this is still strongly related to the volume of patronage. This type of cooperative would not fall within the scope of the definition of mutual cooperatives in the PECOL.

According to article 1.1.3, cooperatives are allowed to use subsidiaries, but only if this is necessary to satisfy the interests of the members and the members of the cooperative maintain ultimate control of the subsidiary. The question is, however, who decides whether using a subsidiary is in the interest of the members, the general meeting or the board of directors. Ultimate control probably means that the cooperative has full control over the subsidiary. In this respect, it is more important to point out that the idea behind the principle reflects that the subsidiary has a key function in the settlement of the patronage relationship between the using members and the cooperative. If the latter is the case, the question is what position of the Study Group takes on the use of subsidiaries that have no part in managing or settling the patronage relationship. It is quite common for producer cooperatives to have also separate subsidiaries with diversified activities. For example, in the case of the Dutch dairy cooperative Friesland Campina, the existing member farmers invested over decades in the cooperative that operates as a holding cooperative that runs on behalf of its members internal branches and subsidiaries. Part of these subsidiaries are involved in the daily settlement of the patronage between the members and the cooperative, the other part of the subsidiaries are engaged in producing special products and non-dairy related products to expand the portfolio to gain a better bargaining position with retailers and to compensate for periods when milk prices are under pressure. From a tax point of view, these cooperatives

[26] Below, I will present comments on the PECOL itself. However, due to restrictions in pages of the article, I confine myself to the most important principles. Of course, the choice is arbitrary.

[27] See C. Iliopoulos, 'Ownership, Governance and Related Trade-Offs in Agricultural Cooperatives', *Dovenschmidt Quarterly* 2014-4, p. 159-167 with further references. See also G.J.H. van der Sangen, *Rechtskarakter en financiering van de coöperatie*, W.E.J. Tjeenk Willink 1999, Chapter 6 with a summary in English.

are treated in the Netherlands as investor-owned firms for this part of the cooperative group, but these activities are very important for the overall performance of the cooperative and therefore for the income position its members. Netherlands' cooperative law does not generically prohibit the use of subsidiaries in this way.[28]

With regard to membership requirements, the PECOL distinguish between cooperator members and non-cooperator members. Cooperator members are the members who engage in cooperative transactions with the cooperative according to article 1.3.2. The minimum of cooperator members is two. In this respect, the cooperative has an associational character. A single member cooperative, therefor, is not a cooperative. Although according to Netherlands cooperative law, a single member cooperative is legally permissible, it results in artificial cooperatives that should not be allowed by cooperative law. Until 1 January 2018, single member cooperatives were used in the Netherlands mainly for tax purposes to avoid Dividend Withholding Tax as cooperatives were generically exempted from Dividend Withholding Tax. As of 1 January 2018, the abuse of the cooperative form resulted in tax measures to avoid tax evasion by using cooperatives, notably by abolishing the general exemption for cooperatives in the Dividend Withholding Tax.[29] However, the Netherlands Civil Code (hereinafter: NCC), Title 3, on Cooperatives has not been revised on this issue.

Article 1.3.6 gives a principle on the restrictions to membership that the restrictions must be reasonable and non-discriminatory. In the commentary to this principle, it is explained that the open door principle of the 1995 ICA Principles does not impose any obligation on the cooperative to accept everyone who applies to join as a member.[30] In this respect, it is worth mentioning that the concept of the cooperative to a certain extent has an associational character. Yet, whether the associational character to organise potential members leads to a mandate to accept potential members depends highly on national cooperative law. For example, Netherlands cooperative law emphasises the associational character of the cooperative, but only with regard to the existing members. According to article 53, section 3, Second Book, NCC, a cooperative is only allowed to enter into transactions with members and is under no obligation under cooperative law to accept new members unless the articles of association provide otherwise.

With regard to the principle of equal treatment of co-operator members, the question arises whether equal treatment also includes the principle of proportional treatment to the extent of the volume of the patronage between a member and the cooperative. In the commentary to article 1.4.2, this issue has not been addressed, but it is highly relevant, because it has also an impact on the question whether under PECOL it is allowed to deviate from the one member, one vote-principle. Proportionality to the extent of the patronage is considered fair in producer cooperatives as a benchmark for equal treatment, taking into account the individual effort of a member. This principle is the mirror-image of the principle in article 1.4.3, that members should to a minimum extent and/or level participate as co-operator members in their cooperative, leading to a reason of member expulsion in case of non-compliance.

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[28] G.J.H. van der Sangen, 'The Netherlands', in: D. Cracogna et.al. (eds.), *International Handbook of Cooperative Law*, Springer Verlag, Berlin 2013, p. 546 and 557.

[29] See on this matter M. Beudeker & E. Kastrop, 'Fiscaliteit & de coöperatie', in: Beudeker/Nijland & Zaman, *De coöperatie anno 2017*, Ars Notariatus nr. 166, Wolters Kluwer, Deventer 2017, p. 11-28.

[30] See also Article 2.2.3 and Fajardo et.al. (eds.), *o.c.*, footnote 5, p. 51.

Article 1.5.5 gives guidance how a cooperative is able to manage transactions with non-members. Section 3 of article 1.5.5. stipulates that cooperatives that engage in transactions with non-members, shall give those non-members the option the become members, which – in a way – creates an open door policy and a mandate to associate potential members which – apart from a very specific type of worker cooperative – is not mandated by cooperative law in the Netherlands in any way. More generally, one might question whether the obligation to open membership to non-members as a condition to allow cooperative transactions with non-members is an infringement of the freedom of association of the existing members: incorporators set the ground rules in the articles of association, including that the cooperatives restricts the number of members or restricts the admission to certain criteria which then – of course – have to be applied in a non-discriminatory way.

Also, article 1.5.5. lays down another principle that contrasts with Netherlands cooperative law: the profits from non-member cooperative transactions are to be allocated to the indivisible reserves. In this respect, I would like to point out that in case of mutual cooperatives – producer cooperatives notably – the members are very reluctant to accumulate net-earnings in the indivisible reserves if there is no technique by which the accrued value of the cooperative – on exit or in case of transfer of their business or after conversion of their financial interest in the unallocated reserves into tradable allocated reserves - can be captured.[31] The rationale for allocating the profits from non-members transactions to the indivisible reserves in case of general interest cooperatives and cooperatives based on solidarity and mutuality is quite obvious, but why this should also be a mandatory obligation for the traditional, mutual cooperative eludes me.

4.2 Cooperative Governance (Chapter 2)

The second chapter of the PECOL gives in six sections an extensive legal framework of cooperative governance. Given the restrictions of this article, I will only be able to point out the most important aspects that contrast with Netherlands cooperative law. However, overall the similarities between the PECOL and Netherlands cooperative law in how cooperatives organise their internal governance, are abundant since both legal frameworks reflect that cooperatives – in the words of the sociologist Dunn[32] – are user-owned, user-controlled and for user-benefit.

Article 2.1.2. stipulates that cooperative governance reflects the jointly-owned, democratically controlled and autonomous nature of cooperatives. It facilitates operation based on 'universally recognised cooperative values and principles, including cooperative social responsibility'. Keywords are autonomy and ultimate democratic member control. According to the commentary to this principle, reference is made to the 1995 ICA Principles. The fact that many national laws require a cooperative to comply with the ICA Statement or a similar norm as a condition of registration under the cooperative law reinforces this requirement, according to the Study Group.[33] The argument is debatable since there are EU member states without this mandate in equal numbers. As indicated above, Netherlands cooperative law

[31] See for techniques of equity raising by members solving the so-called horizon problem C. Iliopoulos, 'Ownership, Governance and Related Trade-Offs in Agricultural Cooperatives', *Dovenschmidt Quarterly* 2014-4, p. 159 with further references.

[32] J.R. Dunn, 'Basic Cooperative Principles and Their Relationship to Selected Practices', 3 *Journal of Agricultural Corporation*, 1988, p. 83-89.

[33] Fajardo et.al. (eds.), *o.c.*, footnote 5, p. 48, referring to France, Italy, Portugal, Spain and the United Kingdom.

and the existing version of the NCR[34] Governance Code for Cooperatives does not in any way mandate cooperatives to adhere to the ICA Principles.[35] If incorporators choose a cooperative based on societal objectives, than some guidance in this respect is helpful, but if incorporators use the cooperative as a jointly owned business unit with an economic objective, the incorporators should be free in organizing their articles of association – of course within the boundaries and restrictions of existing law (cooperative law or any other law).[36]

Section 2.3 of the PECOL provides an extensive overview of the rights and obligations of the members of the cooperative. With regard to the obligations of the co-operator members, the principles are formulated as mandates. In my view, it would be better to formulate the principles with regard to the obligations of the co-operator members as default rules, e.g. 'the cooperative shall ensure that the articles of association regulate that …'. For example, in the Netherlands, according to mandatory law[37] imposing obligations on members need to have a specific legal basis in the articles of association of the cooperative itself and the obligations must be knowable and identifiable from the wording in the articles of association, in order to protect members against unforeseeable financial obligations. Any omission in this respect makes the obligation null and void. Hence, the PECOL on the obligations of members need implementation in the articles of association of a Netherlands cooperative. Reference to the PECOL or a code in the articles of association is insufficient to bind the members to the obligations. Another aspect is that restrictions or a certain combination of restrictions on membership entrance and withdrawal may be an infringement of national or EU competition rules. I leave this aspect without comment.

As indicated above, another question is whether the law or any principle should oblige members to actively interact with the cooperative (article 2.3.1 sub c). This depends on the type of cooperative and should be left to the incorporators to decide while designing the type of patronage and the obligations that go with it in the articles of association.

Article 2.3.2 provides in the possibility to introduce investor members in the cooperative. In practice, some cooperatives do have a genuine demand to be able to introduce investor members as a tool to raise equity capital. The principle laid down in article 2.3.2 stipulates that investor members shall not participate in the governance of the cooperative at all. This principle is contradictory to the existing possibility envisaged in the SCE-Regulation as well as in Netherlands cooperative law.[38] More importantly, any investor will need a certain degree of leverage to safeguard his acquired right to profit on

[34] The National Cooperative Council (in Dutch: de Nationale Coöperatieve Raad) is an association with cooperatives as members to foster the interests of cooperatives in the Netherlands, e.g. through advise, education, information to members and to consult the legislator.

[35] While writing this text, there are no plans to amend the NCC in this way. However, the third version of the NCR Governance Code for Cooperatives which is expected in fall 2019, draws heavily on the 1995 ICA Principles because there is an increasing awareness of and demand for new types of cooperatives, notably small community-based social economy cooperatives, which lack normative guidance from the current cooperative law statute in the Netherlands.

[36] In this respect, it is a further question to what extend cooperatives are allowed to take into account societal aspects without leaving the cooperative form and becoming an association. See on this matter, H.-H. Münckner, 'Germany', in: Fajardo et.al. (eds.), *o.c.*, footnote 5, p. 272 and further. See also G.J.H. van der Sangen, *o.c.*, footnote 4, p. 547, concluding that according Netherlands' cooperative law the objective of the cooperative must be predominantly economic.

[37] Article 34a, Second Book, NCC.

[38] Article 59, Section 2, SCE-Statute and article 38, section 3, Second Book, NCC – both containing clear voting caps to safeguard to full member control.

capital invested. The voting cap in article 59, section 2, SCE-Statute and in article 38, section 3, Second Book, NCC safeguard full member control.

In article 2.3.4 sub f and g, the members have the right to engage in cooperative transactions and to receive any cooperative refund. In my view, this should be left to the incorporators and the bylaws whether members are entitled to a refund, because in practice a lot of cooperatives settle the transactions with their members on market prices without paying any refund to members after closing of the book year, while profits are allocated to the reserves. This is the case with cooperatives banks in the Netherlands and probably elsewhere, but is also becoming increasingly common practice in producer cooperatives. The economic benefit of membership in this type of cooperative lies in the fact that members do have the right to transact with the cooperative while the cooperative is obliged to transact with the member.

In section 2.4, the PECOL provide specific principles and rules on the cooperative governance structure safeguarding direct member control. I fully agree with article 2.4.5 that the members' meeting must have to power to make fundamental decisions, like restructuring (conversion, merger, split-up), dissolving and amending the articles of association as well as the appointment and dismissal of board members. In Netherlands' cooperative law, however, the decision to set-up subsidiaries falls within the scope of the authority of the board. In my view, the PECOL should also address that the articles of association articulate what type of fundamental decisions need prior approval of the members' meeting that go beyond the decisions indicated above. The PECOL in this respect are helpful to understand Netherlands' cooperative law, because the subject matter of fundamental decisions is not addressed properly in Netherlands' cooperative law, leading to potential conflicts between the members and the board about the scope of board supremacy to run the cooperative and its enterprise in the best interest of its members.[39]

With regard to the principles laid down in article 2.4.7-11 on the regulation of plural voting rights, I think the chosen direction of the PECOL is more than adequate. The only issue I have relates to the principle that plural voting rights may not be related to capital contributions. However, in practice we encounter cooperatives that have created the possibility for members to invest in the equity of the cooperative, voluntarily or mandatory, related to the volume of their patronages. In these cases, one could say that the voting rights are still not related to the capital contribution as such, but in essence to the volume of their patronage. Article 2.4.12 stipulates that a special majority is required for all fundamental decisions, which are always made on the basis of the principle of 'one member, one vote'. This should be set as a default rule for mutual cooperatives. Of course, the principle intends to protect minority members against majority oppression, but the principle may have a perverse impact if a small number of active minority members dominate the members meeting and is able to block necessary changes to innovate that are in the interest of all members and the future continuity of the cooperative itself.

Article 2.5.6 stipulates that in mutual cooperatives the majority of members of the administrative and supervisory boards shall be co-operator members. I have doubts whether this principle in all cases is in the interests of all cooperative members. Of course, the members of the supervisory board and the administrative board should be elected by the general meeting as the default rule. However, from the 2012

[39] See for example Court of Appeal Amsterdam, Enterprise Chamber, 27 February 2014, *JOR* 2014/160 (*Coöperatie TICA*) and Court of Appeal Amsterdam, Enterprise Chamber, 8 December 2015, *JOR* 2015/156 (*Coöperatie TICA*) dealing with the question whether the board of directors of the cooperative had the authority to sell the shares of its single subsidiary that settled the patronage between the members and the cooperative. The court held that the transaction resulted in a de facto dissolution of the cooperative and therefore needed prior approval of the members meeting.

EU-commissioned Report *Support for Farmers' Cooperatives* follows that members in mutual cooperatives encountered a lack of professionalism, expertise and dedicated time in case of co-operator member directors or supervisors: depending on the complexity of the operations and the business of the cooperative, there is a genuine demand in practice that boards of the cooperative are – to a certain extend – composed by professionals.[40] The other solution in practice is that the boards of the cooperative are composed of co-operator members, but the actual cooperative business is run through a fully owned subholding company – commonly a private company limited by shares – with a CEO in charge. This model has been increasingly used by agricultural cooperatives.[41] The cooperative governance and proper functioning of the administrative board and the supervisory board would likely improve if the PECOL also addressed principles of independence and (resolving) conflicts of interest, along with the fiduciary duty in article 2.5.8.

4.3 Cooperative Financial Structures (Chapter 3)

One of the most elementary principles of cooperatives is that they are for the benefit of members. User-benefit is also connected with member control and self-financing. I already commented on the principle that a cooperative carries on an economic activity *without profit* as the ultimate purpose, meaning that if a cooperative generates net proceeds or profit, the profit is not distributed to members as a compensation of capital invested. However, any set of principles or law should provide cooperatives enough leeway – which goes hand in hand with the freedom of association – to intertwine the financing of the cooperative and the way the economic activity (patronage) is constructed. Self-financing is the norm, but alternative financial schemes for attracting additional equity from cooperator members and non-using investor members should be possible as well if the incorporators and – after the establishment of the cooperative – the existing members choose to introduce this in the articles of association. Chapter Three on the cooperative financial structure in my view reflect these premises. Also, the set of principles on financial structures in the PECOL give adequate and very useful guidance how to construct the financial arrangement within a cooperative. For example, Netherlands' cooperative law has no specific regime for the financial structure of cooperatives other than the outdated regime of members' liability towards creditors in case of dissolution of the cooperative. Netherlands cooperative law lacks the necessary instruments to design adequate self-financing structures.[42] Below, I would like to make a couple additional remarks.

Cooperative share capital is and should be variable, like article 3.2.3 stipulates, due to an increase or decrease of the number of memberships. This also includes the increase or decrease the volume of patronage while the number of members remains equal. Article 3.3.5 regulates the payment on paid-up capital by way of an 'interest' to members.[43] A fixed interest seems the sensible way to proceed, but some

[40] G.J.H. van der Sangen, *o.c.*, footnote 7.

[41] See J. Bijman, M. Hanisch & G. van der Sangen, 'Shifting Control? The Changes of Internal Governance in Agricultural Cooperatives in the EU', *Annals of Public and Cooperative Economics*, December 2014, Vol 85, No. 4.

[42] See on this issue extensively G.J.H. van der Sangen, *o.c.*, footnote 27, p. 500-505.

[43] In practice, it is not always very clear whether paid-up capital classifies for accounting purposes as equity or as debt. It depends highly on the question whether according to the law or the articles of association there is an unrestricted obligation of the cooperative to refund the paid-up capital to members after a fixed period of time or on withdrawal. The

cooperatives with investing members will offer a return for their investment at a market rate related to the profit of the cooperative. As pointed out above, the principle does not seem to take into account cooperatives that settle patronage transactions on the basis of market prices.

Article 3.3.6 stipulates that cooperative shares may be traded among members or candidates, however not freely but after permission. Investor shares also need permission to be traded. In my view, both restrictions unnecessarily hamper the creation of innovative financial arrangements for financing cooperatives partially with equity: it restricts members in the possibility to transfer cooperative shares of to convert them into freely tradable financial participations that might interest institutional investors to investing in a cooperative. From the PECOL and the commentary to the principles on financial structures, it was not self-evident what the rationale was of this restriction if at the same time there are no voting rights attached to investor members' financial participation in the cooperative. For the Rabobank Group in the Netherlands – the largest cooperative bank –, it would mean that their financial structure is not in compliance with this principle, since part of their non-voting equity participations are traded on the stock market (10%).[44] The second restriction, that investors need prior approval, blocks the free tradability of 'cooperative' securities on the stock market. Here, also the Rabobank case is a good example, but there are more cases to be found in Germany and elsewhere of cooperatives of which financial participation are traded on a stock market.[45] This issue may also be important for equity-rising by general interest cooperatives through crowd funding (not as a gift, but as an investment).

In the section 3.4 about the reserves, a mandatory reserve is created for cooperative education, training and information. The need to create a reserve for education and training in some cases is understandable. This was pointed out in the research of Konrad Hagendorn, who concluded that certain underdeveloped regions and their cooperatives could benefit from education and capacity building.[46] Also this may be acceptable under the state aid rules that exempt certain financial inducements and measurements to the development of rural regions. The question may arise why a mandatory indivisible reserve should be imposed on all cooperatives including mutual cooperatives.

Section 3.5 stipulates that no member shall be liable for the debts for more than the subscribed capital, unless the statutes provide for liability of the members by guarantee, albeit with a cap. It is unclear, however, whether this entails an individual liability of members towards individual creditors during the existence of the cooperative or not. If it entails a direct liability towards creditors, this should be at least a default rule. However, this may deter potential members from becoming a member and it may also trigger members to leave the cooperative. The latter option to withdraw in case of imposing obligations on members is mandatory in the Netherlands.[47] Why not stipulate that members during the course of the cooperative are not liable towards creditors. They may be held liable towards the

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accounting rules in the IFRS on these 'puttable' shares in a cooperative are rather inconclusive. See IAS 32 and IFRIC Interpretation 2. Members' Shares in Co-operative Entities and Similar Instruments.

[44] See https://www.rabobank.com/nl/investors/index.html. This also applies to the farmers' supplies cooperative ForFarmers. See http://www.fromfarmers.eu/. It should be pointed out that according to Netherlands' cooperative law, a cooperative has no share capital structure, while voting rights are only attributed to members, save for the specific provision in article 38, section 3, Second Book, NCC that allows voting rights for non-using members, albeit with a voting cap to safeguard full member control. However, in the case of the Rabobank, no voting rights were attached to the financial participations of investors.

[45] E.g., in Germany Südzucker, in Ireland Glanbia and Kerry, in Finland Atria and HKScan, while Friesland Campina and Arla use stock traded bonds. See also for an overview O.F. van Bekkum, *Cooperative Champions or Investor Targets? The Challenges of Internationalization & External Capital*, Study commissioned by Landburg & Fødervarer, December 2009.

[46] K. Hagendorn (2014), 'Post-Socialist Farmers' Cooperatives in Central and Eastern Europe, *Annals of Public and Cooperative Economics*, December 2014, p. 555.

[47] See article 36, section 3, Second Book, NCC.

cooperative, upon liquidation for the deficit or during its existence, again with the possibility of a maximum cap.

Section 3.6 gives one example how the net proceeds of a cooperative could be distributed. As an example of a guideline it could work, but the specific financial arrangements should be left to the articles of association in view of the way how a cooperative is financed and the patronage relationship is settled. As indicated earlier, mutual cooperatives may not use the refund-technique, but pay market prices to their members. Another point should be made in this respect. Although self-financing within cooperatives is the norm, it is the responsibility of the board of directors under supervision of the supervisory board to provide a proper level of financing of the cooperative. Undercapitalisation of the cooperative leading to insolvency normally leads to directors' liability. The PECOL should address this fiduciary duty but also its restrictions in member control, since other stakeholders are involved as well, like employees and creditors.

Section 3.7 stipulates that results from non-cooperative transactions should be allocated to the indivisible reserves. Does this mean that they are not distributable to members as part of their payment for the patronage? Reserving these results to the indivisible reserves may lead to double taxation in some member states[48] and in any case effect the amount available to members and their income position.

Section 3.8 is dedicated to principles on to liquidation. Article 3.8.2. stipulates that residual net assets shall be distributed in accordance with principle of disinterested distribution. A similar principle is envisaged in article 75, SCE Statute. Article 75, SCE Statute, acknowledges that in certain member states the cooperative laws may have an alternative arrangement. Netherlands cooperative law – viewing the cooperative as a private member organisation and its members as the residual claimants – allocates the residual net assets to the members. On the basis of article 23a, section 1, Second Book, NCC, members are entitled to equal distribution of the net proceeds, unless the articles of association provide otherwise. Articles 3.8.2 with regard to the disinterested distribution should be considered to be formulated as a default rule by which the freedom of association is upheld.

For example, suppose in a certain region twenty growers of prunes establish a cooperative that collects their prunes and manufactures and markets a beverage. The members invested in the cooperative and in the quality of the prunes and product and in the branding of the quality. The cooperative has registered the brand with the competent authorities. After thirty years, the sons of the sons of the initial founders have moved to town. The only solution – because there is no other cooperative in the area – is to sell-off the trademark to a non-cooperative competitor, pay all creditors and liquidate the cooperative. The residual profit will be distributed to members in proportion to their investment which through the years was connected to the volume of their patronage. Why should it not be possible that these growers stipulate in the articles of association that the residual net assets will be distributed proportionally to members at the time of dissolution?

[48] This is the case in the Netherlands: any reservation of the net proceeds leads to double taxation under the Corporate Income Tax 1969 rules that also apply to cooperatives. See G.J.H. van der Sangen, 'Netherlands', in: D. Cracogna et.al. (eds.), *International Handbook of Cooperative Law*, Springer-Verlag, Berlin 2013, p. 557.

4.4 Cooperative Audit (chapter 4)

Chapter 4 is dedicated to cooperative audit and draws heavily on the extensive rules and regulations in this respect in German cooperative law.[49] I have no additional comments to this section which is not to say that the subject matter is not important for cooperatives. On the contrary. In my view – based on the results of the 2012 *Support for Farmers' Cooperatives Project* – expert auditing and subsequent transparency and information towards members how the success and performance of the cooperatives is measured related to the patronage and non-cooperative activities, is pivotal. According to the 2012 *Support for Farmers' Cooperatives Report*, in several EU member states the accountability due to a lack of financial experts (auditors) and expert supervision of a supervisory board was troublesome, resulting in lacunae in accountability.[50] Further research should be done into the question whether specific 'cooperative' auditors will lead to better informed members. For example, auditing the annual accounts of cooperatives in the Netherlands is left to market parties and there are no auditor firms that specifically focus on only cooperatives. Also, there are no specific set of rules on accounting for cooperatives distinct from investor-owned firms. Yet, there is no indication that members of cooperatives in the Netherlands are not informed properly about the performance of cooperatives. One reason is that members of a cooperative have the right to file for an inquiry procedure at the Court of Appeal, Enterprise Chamber,[51] in case of non-compliance with accounting rules and could also file for a restatement of the annual financial accounts in case the annual financial accounts are drawn-up incorrectly.[52]

4.5 Cooperation among cooperatives (chapter 5)

In the Chapter on cooperation among cooperatives, the Study Group drew-up principles to give legal guidance to one of the 1995 ICA Principles. As such, the principles intend to create scale and power vis-à-vis investor-owned firms. Of course, EU member states may promote the cooperation between cooperatives by giving financial inducements to them within framework and rules for EU state aid. However, my main concern is with respect to the PECOL on cooperation among cooperatives is that any mandate to cooperate between cooperatives is bound to be in conflict with the principle of autonomy and the freedom of association. In this respect, it should be pointed out that the ICA Principles via its incorporation into the ILO Recommendation No. 193 are only binding for the members of the ILO and do not give any mandate to cooperatives unless stipulated otherwise by national law, which is the case in Portugal.[53]

Also, whether a cooperative should seek in all circumstances cooperation with other cooperatives is a business decision and if it results in a major transaction which changes the structure and governance of the cooperative fundamentally, the general assemble should give prior approval. In the respect, the PECOL strive for scale through the formation of secondary or federated cooperatives. The formation of

[49] See H. Munckner, 'Germany', in: Fajardo et.al. (eds.), *o.c.*, footnote 5, p. 319-330.

[50] G.J.H. van der Sangen, *o.c.*, footnote 7, p. 22.

[51] Article 346, section 1, sub a, Second Book, NCC.

[52] Article 447, Second Book, NCC.

[53] See article 3 Portuguese Civil Code. On this subject: D. Meira, 'Portugal', in: Fajardo et.al. (eds.), *o.c.*, footnote 5, p. 415.

federated cooperatives or second tier cooperatives should be formed based on a business case. Sometimes a merger is better. Based on the 2012 *Support for Farmers' Cooperatives Project*, data suggest that federated cooperatives did not perform better than primary cooperatives, quite the opposite.[54]

5. Concluding remarks

Drafting Principles of European Cooperative Law has been an ambitious project. In this article, the objectives of the PECOL, their role in the legal framework of EU Cooperative Law and their content were discussed and commented. The PECOL fill in a gap between generally accepted, universal cooperative principles and cooperative law. From the evolution of the SCE Statute and the research on its implementation by the research group of Euricse and its partners,[55] one can conclude that cooperative laws in the EU are highly path-dependent. In this respect, the PECOL provide a more detailed set of principles that could be used by legislators, co-operators, policy-makers and scholars to discuss what the essentials are of the cooperative as a legal business form. The next step, in my view would be to draft model acts as an inspiration how to set-up cooperatives. In this respect, further research is needed into the question whether two set of principles and model acts are required. One for the mutual cooperative and one for the general interest cooperative. In some jurisdictions the general interest cooperative as envisaged in the PECOL might be viewed more as an association than as a cooperative. Also, the question arises whether the PECOL reflect the nature of mutual cooperatives with a pure economic objective. While commenting on the PECOL, I highlighted some remarkable differences with regard to Netherlands' cooperative law and submitted that Netherlands cooperative law could benefit from the PECOL especially in the field of financial structure and auditing of cooperatives. Also, the PECOL could be used to reform Netherlands cooperative law to facilitate cooperatives in the field of social economy.[56]

Apart from a point of reference for future cooperative law-making, the importance of PECOL lays in my view in the following intertwined aspects. First of all, legislators do not always have an adequate understanding of the quintessential characteristics of the cooperative. For example, in the Netherlands, the focus of the legislator is on investor-owned firms and financial market regulation without addressing the specific nature of the cooperative in rules that apply to all private companies. It leads to the companisation of cooperatives.[57] Secondly, the SCE Statute gave a boost to the cooperative and intensified academic debate on cooperative law. However, the SCE Statute itself was construed on the foundations of the Societas Europeae, which in turn was based on the public company. Thirdly, the PECOL not only provide guidelines to take into account while revising future business organizational cooperative law, but also creates awareness of the identity of the cooperative in other fields of law as well, like tax law and competition law. Fourthly, the PECOL provide a legal framework for those member states, like the Netherlands, that are unfamiliar with the role of mutual cooperatives with a societal dimension and which role these cooperatives can play in the social economy. At this point, Netherlands

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[54] J. Bijman et.al., *Support for Farmers' Cooperatives*, Final Report, November 2012, p. 11, available at http://ec.europa.eu/agriculture/external-studies/index_en.htm.

[55] Euricse et.al., *Study on the Implementation of the Regulation 1435/2003 on the Statute for European Cooperative Society*, 5 October 2010.

[56] On 17 May 2019, the Dutch Government announced a feasibility study for a business form specifically designed for 'social enterprises'.

[57] See above, footnote 19.

cooperative law is missing this normative aspect, while at the same time the societal demand for such a legal framework is growing.[58] Fifthly, the PECOL already function as the starting point of the emergence of cooperative law as an autonomous field of law distinct form company law. In this respect, the PECOL could reinstate the societal, inclusive and normative aspect that Netherlands cooperative law once had. As the promotor of the cooperative movement in the Netherlands J.H. Boudewijnse pointed out 120 years ago: 'A genuine cooperative is cooperative that in its endeavours adheres to the same principles once put into practice so brilliantly by the Pioneers of Rochdale. A false cooperative concern the type of association that, formally established as a cooperative and acknowledged as such by law, only strives for self-centred objectives.[59]

[58] See G.J.H. van der Sangen, 'De rol van principles in het coöperatierecht' ('The Role of Principles in Cooperative Law'), *TvOB* 2019-2, p. 36-43.

[59] J.H. Boudewijnse, *Welke zijn de beginselen die aan de toepassing der Coöperatieve denkbeelden ten grondslag behooren gelegd te worden*, Drukkerij Trio, The Hague 1899, p. 15.

THE PORTUGUESE SOCIAL SOLIDARITY COOPERATIVE *VERSUS* THE PECOL GENERAL INTEREST COOPERATIVE

Deolinda Meira
CEOS.PP/ISCAP/P.PORTO
meira@iscap.ipp.pt

ABSTRACT

The Principles of European Co-operative Law ('PECOL') considers the Portuguese social solidarity cooperative as an example of a co-operative model that approaches the general interest cooperative. The general interest cooperative and the Portuguese social solidarity cooperative are both structured to pursue economic activity mainly in the general interest of the community. They also base their entire activity on the notion of solidarity. For these reasons, the legal frameworks for both types of cooperative have certain peculiarities regarding their categories of members, financial structure, governance and audit regimes. This paper analyses the main similarities and differences between the general interest cooperative and the Portuguese social solidarity cooperative.

KEY WORDS: PECOL, general interest cooperatives, social solidarity cooperatives, mutuality, altruism, solidarity, community.

SUMMARY: 1. Introduction. 2. The concept of cooperative in Portuguese legislation and in PECOL principles. 3. The composition of the membership group. 4. Financial structure. 5. Governance. 6. Cooperative audit. 7. Conclusions. 8. Bibliographical references.

1. INTRODUCTION

The modern cooperative faces several challenges: to retain the cooperative identity, to achieve sustainability, to compete with profitable economic agents in an open economy, and to respond to new purposes.

In order to respond to these challenges, the cooperative model has to reinvent itself. This reinvention brings some changes to the configuration of the scope of cooperatives. This scope does not have to be "exclusively mutualistic". It may be "predominantly mutualistic." It does not have to only be pursued directly. It may, in certain conditions, be pursued indirectly. It does not have to respond only to the interests of the co-operators. It may respond mainly to the interests of the community.

It is in the context of this reinvention of the cooperative model that Italy, in 1990, introduced a law on social cooperatives (Law No. 381/1991). According to this law, social cooperatives pursue "the general interest of the community in promoting personal growth, and in integrating people into society by providing social, welfare and educational services and carrying out different activities for the purposes of providing employment for disadvantaged people".[1]

Similar cooperative models emerged across Europe, albeit with changes and adaptations. The following examples are closest to the general interest cooperative discussed in this paper.

In 1998, Portugal published Decree-Law No. 78/98 to regulate "social solidarity cooperatives". These are cooperatives whose activities are concentrated in the area of social services, and whose primary objective is to assist in situations of social and economic vulnerability. Social solidarity cooperatives provide assistance to families, children, young people, seniors, disabled, unemployed and other vulnerable groups. They operate in areas including professional integration, education, training, occupational and residential care.

In 1999, Spain published Law No. 27/1999, recognising "social initiative cooperatives", whose goals are either: the provision of welfare services through health, education, cultural or other activities of a social nature; or the conduct of any economic activity with the purpose of integrating those who suffer any kind of social exclusion into the labour market; or meeting social needs that are not being attended to by the market (Article 106(1)).[2]

In 2001, by Law No. 2001/624, of 17 July, 2001, as amended by Law No. 201/856 of July 31, 2014, France introduced a new type of co-operative society, the Co-operative Society for Collective Interest (*société coopérative d'intérêt collectif)*, whose purpose, according to its legal definition, is "the production or the supply of collective interest goods and services, with a social utility character."[3]

One of the main reasons given for the emergence of special laws for cooperatives with a purpose focused on the pursuit of the general interest, was the inadequacy of mainstream cooperative laws to accommodate entrepreneurial and innovative phenomena characterized by an objective of collective interest, the absence of scope for profits, and a mode of organization based on democratic and participatory principles.[4] The emergence of these new laws raises the following questions: Is it permissible for a cooperative to have, as its predominant or exclusive purpose, the satisfaction of the interests of the community rather than its members? Can the interests of members be translated into the

[1] - See THOMAS, A., "The Rise of Social Cooperatives in Italy", *Voluntas: International Journal of Voluntary and Nonprofit Organizations*, 15(3), 2004, pp 243-263. http://dx.doi.org/10.1023/B:VOLU.0000046280.06580.d8

[2] - See RODRÍGUEZ, A. & ORTEGA, A, "Algunas consideraciones sobre las cooperativas de iniciativa social en el marco del fomento de empleo y la inserción laboral. una perspectiva jurídico-económica", *CIRIEC. Revista Jurídica de Economía Social y Cooperativa*, 19, 2008, pp. 57-78.

[3] - See MARGADO, A., "SCIC, Société coopérative d'intérêt collectif", RECMA- *Revue Internationale de l'économie sociale*, 284, 2002, pp. 19-30.

[4] - See FICI, A., La funzione sociale delle cooperative: note di diritto comparato", *Verso un Diritto Dell' Economia Sociale. Teoria. Tendenze e Prospettive Italiane ed Europee*, Napoli: Editoriale Scienttifica, 2016, pp. 241- 263; HIEZ, D., "The general interest cooperatives: a challenge for cooperative law", *IJCL - International Jounal of Cooperative Law*, I, 2018, pp. 93-109.

interests of the community, based on the values of altruism and solidarity? Are these entities true cooperatives or do they approach associations? Is there a new type of cooperative?

All of these issues were canvassed in the Principles of European Cooperative Law (PECOL) project. The PECOL are a set of norms that are presented as "ideals" in the regulation of European cooperatives and reflect their key characteristic features. These standards were developed by a small team of legal scholars (Study Group on European Cooperative Law -SGECOL), following a comparative investigation of cooperative law and best practice in seven European legal systems (Germany, Spain, Finland, France, Italy, Portugal and the United Kingdom).[5] The PECOL project did not have the specific objective of promoting the harmonization of national legislation on cooperatives. Rather, these principles can be recognized and assumed by cooperative organizations and can be a reference for legislators when regulating cooperatives.[6]

In view of the fact that general interest cooperatives are a reality in several legal systems, the PECOL principles admit that "Cooperatives may also be established to carry on an economic activity mainly in the general interest of the community ("general interest cooperatives")" (Section 1.1 (3)). According to PECOL (Chapter 1 – Section1.1.(4)), general interest cooperatives are a special type of cooperatives, whose purpose is to satisfy not the interests of the members (through transactions with them as consumers, providers or workers of the cooperative enterprise) but the general interest of the community. PECOL considers the Portuguese social solidarity cooperative, regulated by Decree-Law No. 78/98, January 15th, as an example that approaches the general interest cooperative.

Both general interest cooperatives and social solidarity cooperatives are structured to pursue an economic activity that is mainly in the general interest of the community. Social solidarity cooperatives are cooperatives whose activities are concentrated in the area of social services. They have a clear mission to assist those in situations of social and economic vulnerability, supported by a paradigm of social intervention. These cooperatives base their entire activity on the notion of solidarity, and for this reason they fall under a legal framework with certain peculiarities, both as regards the categories of members, their governance, their financial structure and audit regime.

In this context, this paper aims to answer two questions:
(i) Can Portuguese social solidarity cooperatives be considered general interest cooperatives, in PECOL terms?
(ii) What are the specificities of the legal regime that characterize general interest cooperatives and social solidarity cooperatives?

[5] - The Study Group on European Cooperative Law (SGECOL) aims to conduct comparative research on cooperative law in Europe. **Principles of European Cooperative Law (PECOL)** was its first project. See FAJARDO, G., FICI, A., HENRŸ, H., HIEZ, D., MÜNKNER, H., HIEZ, D., "El nuevo grupo de studio en derecho cooperativo europeo y el proyeto "Los principios de derecho cooperative europeo", *CIRIEC. Revista Jurídica de Economía Social y Cooperativa*, 24, 2013, pp. 331-350.

[6] - See HIEZ, D., "Introduction", In G. Fajardo, A. Fici, H. Henrÿ, D. Hiez, D. Meira, H. Münkner, and I. Snaith, (eds), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge, Intersentia, 2017, pp. 1, ff.

In answering these questions, the ordinary cooperative as regulated by the *Portuguese Cooperative Code* (*PCC*),[7] will serve as *secundum comparationis* for these two other types.

2. The concept of cooperative in the Portuguese legislation and in the PECOL Principles

In Portugal, the cooperative is defined as an "autonomous association of persons, freely associated, of variable composition and capital, which, through cooperation and mutual assistance of its members, and in obedience to cooperative principles, aims not at profit but at satisfying economic, social or cultural needs and aspirations of the said members." (Article 2 of the *PCC*).

This definition is based on four distinctive features of this type of legal entity. The first two have a formal character — the variability of the social capital and variability of the shareholding structure. The other two are of a substantive nature — the *social object* of the cooperative (the satisfaction of the economic, social or cultural needs of members, though remaining a non-profit entity) and the management style of the cooperative enterprise (obedience to cooperative principles, and cooperation and mutual assistance of members).

It is worth noting that this definition of a cooperative makes compliance with the cooperative principles a mandatory requirement. These principles are embodied in Article 3 *PCC:* voluntary and open membership; democratic control by the members; member economic participation; autonomy and independence; education, training and information; co-operation among co-operatives; and concern for the community. This article reproduces verbatim the cooperative principles as enshrined in the International Cooperative Alliance (ICA) Statement on the Cooperative Identity,[8] with the latest interpretation given to them by the 2015 ICA Guidance Notes to the principles.[9]

In the Portuguese legal system, the cooperative principles are mandatory and are even enshrined in the Portuguese Constitution (*CRP*). No. 2 of Article 61 of the *CRP*, states that "Everyone is accorded the right to freely form cooperatives, subject to compliance with cooperative principles." In turn, No. 4, a) of Article 82 of the *CRP* states that the cooperative subsector covers "the means of production that cooperatives possess and manage in accordance with cooperative principles." Consequently, a disrespect for the cooperative principles in the business operation is a cause for dissolution [Article 77, No.1, h), *PCC*]. This definition refers to ordinary cooperatives who have a mutualistic purpose or scope. It must aim to satisfy the needs of its members as consumers, suppliers or workers of the cooperative. It is this mutualistic purpose that distinguishes them from other entities.

[7] - Law No. 119/2015, published in 31 August 2015 and entered into force on 30 September 2015.

[8] Text of the 1995 ICA Statement on the co-operative identity at: http://ica.coop/en/whats-co-op/co-operative-identity-values-principles.

[9] - See NAMORADO, R., "Artigo 3.º", In D. Meira and M. E. Ramos (eds), *Código Cooperativo anotado*, Coimbra, Almedina, 2018, pp. 28-36. Although ICA is a non-governmental organization, it should be taken into account that these principles have been integrated in the 2002 International Labour organization Recommendation No. 193 concerning the promotion of cooperatives (ILO R. 193). ILO R.193 is the text of an international and transnational organization, which the Portuguese State voted for. On this subject see HENRŸ, H., "Public International Cooperative Law: The International Labour Organization Promotion of Cooperatives Recommendation, 2002", In D. Cracogna, A. Fici and H. Henrÿ (eds), *International Handbook of Cooperative Law*, Heidelberg: Springer, 2013, pp. 65-88.

The *cooperative social object* articulates two dimensions: the economic and the social. The economic dimension is present in Article 2, No.1 *PCC* referring to the cooperative scope as "*meeting the needs and economic aspirations*" of its members. The cooperative is an enterprise dedicated to the production of goods and services, under the *aegis* of a rationality that implies the maximization of results and containment of costs. The term "*enterprise*" is understood in a broad sense to mean any form of organization of human, material or financial resources to pursue economic purposes, whether or not they are profitable. The cooperative is a business organization with economic aims, carried out in an economical way. For example, they may be designed to achieve a lower cost of goods for the benefit of their members than could be obtained by other means. Even cooperatives whose primary purpose is to pursue cultural aims for the benefit of members have an economic dimension. The meeting of its members' needs involves a cost and therefore must have a price to be minimised.

In the *PCC*, the importance given by the legislator to the predominant economic purpose of the cooperative becomes apparent, as illustrated in Article 7: "*while complying with the law and the cooperative principles, cooperatives can freely carry on any economic activity.*" However, this is a business entity with the specificity of pursuing a mutualist scope. This means that the cooperative's social activity is necessarily directed to its members, who are the main users of the economic and social activities that it carries out. This "dual capacity" is based on the carrying on of an economic activity in which members participate. This participation will lead to a mutual exchange of benefits between the cooperative and the members. Such benefits are specific to the cooperative's social object. In fact, the coop member, unlike a stockholder in a commercial company, not only has the obligation to contribute to the cooperative share capital, but also an obligation to participate in the cooperative activity. In this sense, Article 22, No. 2, c) of the *PCC* states that members should "participate in the general activities of the cooperative and provide work or service which are assigned to them."

The members' obligation to participate in cooperative activity emerges as a basic mechanism for developing the cooperative's social object and achieving mutual advantage. However, it must be noted that the teleological connection between the cooperative and its members should not be understood in absolute terms and the cooperative should not be considered as a closed organization, operating solely with its members. While the principle of mutuality is an underlying and distinctive feature of cooperatives and one that distinguishes them from other legal entities, it does not necessarily mean that the cooperative only conducts business with its members. It may carry on activity with non-members.

The possibility of entering into contracts with non-members means that the cooperative will be open to business with outside partners, offering its services to those who, although not members, share the same needs. Simultaneously, it must prioritise the satisfaction of the interests of its members. This new conception of mutuality enables cooperatives to operate in the market by competing with other businesses in the provision of goods and services to non-members. In line with this conception, the *PCC*, in its Article 2, No. 2, states that "cooperatives, in pursuit of their objects, are allowed to conduct business with non-members, subject to any restrictions laid down in the law applicable to each cooperative type." Although the law does not define what is meant by non-members, there seems to be a consensus around the views of Rui Namorado, that "non-members, from the cooperative point of view, are those who hold a business relationship directly related to the carrying on of the cooperative's primary object, as if they

were members, although, in fact, they are not."[10] This means that any business the cooperative conducts with non-members should be the same kind of business that is conducted with its members.

To preserve the mutualist scope of cooperatives, transactions with non-members may be subject to limitations in the sectorial legislation of different types of cooperative. Such limitations are expressly provided for in the following: Article 9, Decree-Law No. 523/99, December 10 (trade cooperatives), Article 7, Decree-Law No. 313/81, November 19 (cultural cooperatives), Article 14, Decree-Law No. 502/99, November 19 (housing and building cooperatives), Article 6, Decree-Law No. 309/81, November 16 (worker cooperatives), in Article 6, Decree-Law No. 323/81, December 4 (service cooperatives), and Article 24, nos. 2 and 3, Decree-Law No. 24/91, January 11 (agricultural credit cooperatives), This latter Decree places a limits on the agricultural credit cooperatives' credit transactions with non-members (35% of the cooperative's total net assets, which may be increased to 50%, subject to authorization by the Bank of Portugal).

It follows that, in Portuguese Law, cooperatives are characterized by "a predominantly, though not exclusively, mutualistic scope and may conduct business with non-members."[11] Given the mutualist aim of cooperatives and obedience to the cooperative principle of voluntary and open membership, anyone interested — and who meets the admission requirements — should be able to join as a member of the cooperative and benefit from the services it offers. To do so, the prospective member must apply to the Board of Directors of the cooperative for admission to membership [Articles 19, No.1 and 47.d), *PCC*]. Rui Namarado argues that "*any restriction on the free entry of new members must derive from the very nature of the cooperative and not from an arbitrary judgment of rejection, potentially discriminatory, because it is based on individual preferences.*"[12] The Board's decision to accept a candidate for membership must rest on their ability to use the services of the cooperative; to carry out the work required by the cooperative; and their willingness to accept cooperative culture and values.

The Portuguese cooperative legislator established that the statutes of each cooperative must contain the "*admission requirements*" of members [Article 16. No. 2, a) *PCC*]. If a candidate meets those conditions, the proposed admission must still be subject to approval by the Board of Directors [Article 47, d) *PCC*]. This resolution is mandatory for the acquisition of membership. Therefore, there is no subjective right to be admitted as a member. Various authors consider this to be an ordinary legal expectation i.e., an active position that, although legally significant, lacks the assurance mechanisms of subjective rights.[13] Under Portuguese Law, the General Meeting will act as an appeal body as to the admission or rejection of new members [Article 38, k) *PCC*].

The *cooperative social object* is not limited to meeting the needs of its members. It should equally attend to the interests of the community in which the cooperative carries on its activity. The principle of concern for community is set out in Article 3 *PCC*, where it is stated that: "cooperatives work for the sustainable

[10] - See NAMORADO, R., *Cooperatividade e Direito Cooperativo. Estudos e Pareceres*, Coimbra, Almedina, 2005, pp. 184-185.

[11] - See MEIRA, D. A., "As operações com terceiros no Direito Cooperativo Português (Comentário ao Acórdão do Supremo Tribunal de Justiça de 18 de Dezembro de 2007)", *Revista de Ciências Empresariais e Jurídicas*, 17, 2010, pp. 93-111.

[12] - See NAMORADO, R., *Os Princípios Cooperativos*, Coimbra, Fora do Texto, 1995, p. 61.

[13] - In this sense, see for all NAMORADO, R., *Cooperatividade e Direito Cooperativo. Estudos e pareceres*, p. 21.

development of their communities through policies approved by their members." Although primarily focused on the needs of their members, cooperatives work to achieve the sustainable development of their communities, under criteria approved by their members.

This principle is strongly connected with another cooperative principle: voluntary and open membership, which is the traditional *open door principle* formulated in Article 3 *PCC*: "*Cooperatives are voluntary organizations, open to all persons able to use their services and willing to accept the responsibility of membership, without gender, social, racial, political or religious discrimination.*" This principle can be considered under two perspectives. Firstly, joining should be voluntary, as it depends exclusively on the will of the member. Secondly, the cooperative must be open to all people, providing that its member candidates meet two requirements: the ability to benefit from and contribute to the cooperative's transactions, and acceptance of the responsibilities of membership. The way that these two principles connect is evident. The traditional open-door policy adopted by the cooperative when accepting new members is justified by its willingness to service the community in which it is embedded. Openness to members who reside in the area where the cooperative carries out its activity is a constant characteristic of this type of organization. This practice means that the cooperative is a generator of stable jobs. It is an organization that is strongly rooted in the community. It carries on activities that typically do not allow relocation and this provides the fuel for a local entrepreneurial spirit. Consequently, cooperatives have a special responsibility to ensure that the development of their communities is economically, socially and culturally sustainable. Under these principles, cooperatives become involved in the social context. It is the members' responsibility to decide upon the policies through which this involvement will materialize.

The principle of education, training and information is also relevant to the defence of the claim that the cooperative object is within the scope of the socially relevant activities. In Article 3 *PCC* the legislator says that "*cooperatives will provide education and training for their members, elected representatives, managers and employees, so they can contribute effectively to the development of their cooperatives. They will inform the general public, particularly the young and opinion leaders, about the nature and benefits of cooperation*". This principle emphasizes the obligation of cooperatives to guarantee the education and training of their members, representatives of the elected bodies, directors or employees, in cooperative thought and action. This principle also includes the duty to inform the general public in order to raise awareness of the nature and benefits of cooperation and to encourage new membership, especially, informed membership.

It should also be noted that the law provides for a compulsory reserve fund "for cooperative education and technical and cultural training of members, and employees of the cooperative as well as of the community" (Article 97 *PCC*). The establishment of reserves for education and training means that the cooperative is not only a business organization, but also an organization with social and educational concerns. This reserve fund aims to bear the costs of activities that are beyond the satisfaction of the purely individual interests of cooperative members. These activities are not strictly of an economic nature, but may result in direct or indirect, immediate or deferred economic benefits, both to the cooperative and to the community where the cooperative operates. This reserve is one of the most distinctive features of the cooperative enterprise when compared with other types of enterprise. It generates assets that are

allocated to social purposes, to the benefit of members, cooperative workers and to the social environment.[14]

Finally, further evidence of the social dimension of the cooperative object can be found in the principle of disinterested distribution of assets. This principle is enunciated in Article 114 *PCC*, which states that on a winding-up, residual assets cannot be distributed among the members. This principle emphasises the social role that the cooperative fulfils and it implies that in the end, assets are to be allocated to the promotion of cooperation. Article 114, No.1 of the *PCC* provides that on the winding-up of the cooperative, any legal reserves that are not allocated to covering losses of the financial year and which may not be used for any different application "*can move, with the same purpose, to a new cooperative entity to be formed following the merger or division of the cooperative in liquidation.*" Article 114 No. 3 states that "when no new cooperative succeeds the cooperative in liquidation, the application of the mandatory reserve balance will be allocation to another cooperative, preferably from the same city, to be determined by a federation or confederation that represents the main activity of the cooperative." Article 114, No.4 goes further, stating that "to the reserves established under the provisions of Article 98 of this Code apply, in the event of liquidation and when statutes do not provide otherwise, the provisions of numbers 2 and 3 of this Article", which means that free reserves may also be covered by the principle of disinterested distribution.

In the PECOL principles, the definition of a cooperative is focused on its objective and there is no express reference to obedience to the cooperative principles. According to PECOL principles, ordinary cooperatives are "legal persons governed by private law that carry on any economic activity without profit as the ultimate purpose and *mainly* in the interest of their members, as consumers, providers or workers of the cooperative enterprise" (Section 1.1.(1)). For PECOL, the mutual scope of cooperatives "does not prevent cooperatives from pursuing additional objectives that go beyond the interests of their members and may be qualified as 'altruistic'."[15] It is in this sense that the use of the word "mainly" in the PECOL definition of cooperatives should be understood. So, cooperatives may also be established "to carry on an economic activity mainly in the general interest of the community ('general interest cooperatives')" (Section 1.1. (4)).

In addition to the economic dimension of its object, an ordinary cooperative may also have a complementary social object fulfilling the 7th ICA principle "concern for the community". However, in a general interest cooperative this complementary objective becomes the main or even exclusive objective. In this context, the legal regime of the general interest cooperatives deviates from the legal regime of ordinary cooperatives n the following ways: general interest cooperatives are not obligated to undertake cooperative transactions with their members as consumers, providers or workers; they face no limitation

[14] - On this principle, see MEIRA, D., *O regime económico das cooperativas no Direito Português: o capital social*, Porto, Editora Vida Económica, 2009, pp. 162-167.

[15] - See FICI, A., "Chapter 1- Definition and Objectives of Cooperatives. Commentary", In In G. Fajardo, A. Fici, H. Henrÿ, D. Hiez, D. Meira, H. Münkner, and I. Snaith, (eds), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge, Intersentia, 2017, pp. 27, ff.

on transactions with non-cooperator members; and they may freely admit to membership non-cooperator members (PECOL Chapter 1)[16].

These deviations are not provided for in Decree Law No. 7/1998 of 15 January 1998 governing Portuguese social solidarity cooperatives. This law imposes limits for transactions with non-cooperator members. In fact, Article 2(2) establishes "Beyond the enumeration contained in the foregoing subsection, social solidarity cooperatives can undertake other activities of similar nature and, within the limits defined by the Cooperative Code, offer services to third parties". Social solidarity cooperatives cannot freely admit to membership non-cooperator members. Finally, as we shall see in the next section, social solidarity cooperatives are obligated to undertake cooperative transactions with their effective members.

3. The composition of the membership group

Ordinary cooperatives pursue a mutual purpose and so they are comprised of mainly co-operator members. In the case of general interest cooperatives, the activity pursued aims to meet the needs of the community, so the main beneficiaries will be not the members of the cooperative but the community. Consequently, in general interest cooperatives, membership is not a necessary condition to obtain services and goods. Importantly, services and goods are not defined to meet the needs of the members, because their altruistic purpose is to satisfy the interest of the community and not their members. According to PECOL Principles, general interest cooperatives are not obligated to undertake cooperative transactions with their members as consumers, providers or workers (PECOL, Chapter 1, sec. 1.4(1)).[17]

In contrast, in Portuguese social solidarity cooperatives, membership is a necessary pre-condition to obtaining services and goods. In the light of the definition contained in the Portuguese Cooperative Code, cooperatives characterize themselves by uniting people who share needs or aspirations to meet them through an economic activity developed in common. Membership is a pre-condition for the satisfaction of their needs, which will determine the object pursued by the cooperative.

Another important criterion for distinguishing ordinary cooperatives from general interest cooperatives is the composition of membership groups. In general interest cooperatives we can find a number of different categories of members: non-using investing members; promoting members; voluntary members; enterprises working in the community or region; as well as private and public corporations. For example, in the Italian social cooperatives (Law 381/91) the ownership structure may simultaneously include: worker members, including practitioners and managers who are remunerated; user members who are the recipients of the services supplied by the cooperative or their family members; volunteer members, who work in the cooperative freely, without receiving any form of compensation; financing members, defined as suppliers of capital with limited rights to participate in the decision-making and governance of the organization; and legal entities.

In contrast, the Portuguese social solidarity cooperative recognises only two categories of members: effective members and honorary members. The effective members are the reference members of the cooperative. They comprise those who intend to use the services provided by the cooperative for their

[16] - See FICI, A., "Chapter 1- Definition and Objectives of Cooperatives. Commentary", pp. 27, ff; HIEZ, D., "The general interest cooperatives: a challenge for cooperative law", pp. 98-101.

[17] - See FICI, A., "Chapter 1- Definition and Objectives of Cooperatives. Commentary". pp. 27, ff.

own benefit or that of their relatives, or who intend to develop their professional activity in the cooperative. According to Portuguese legislation, social solidarity cooperatives are obligated to undertake cooperative transactions with their effective members. Honorary members are those who contribute with goods or services, including social volunteering, to the development of the cooperative's object. The admission of honorary members is made by the members in General Meeting, on the basis of reasoned proposal by the board of directors, which must contain a report on the donations of goods or services that contribute noticeably to the development of cooperative object (Articles 4 and 5 of Decree-Law No. 78/98). This has the effect that, in the current state of the Portuguese cooperative legislation, a social solidarity cooperative whose purpose is only to satisfy the general interest of the community, is not allowed. In other words, a social solidarity cooperative is not allowed without a minimum mutualistic scope.

4. Financial structure

In Portuguese social solidarity cooperatives, the distribution of surplus among co-operators is prohibited, which means that all surpluses will revert, mandatorily, to reserves (Article 7 Decree-Law No. 78/98, January 15th).

The same requirement is provided in the PECOL principles. General interest cooperatives may not distribute cooperative surpluses to their members (Section 3.6.(6)). The prohibition on the distribution of cooperative surpluses to members for both general interest cooperatives and social solidarity cooperative flows from the fact that they develop their activity mainly in the interest of the community, guided by the values of altruism and solidarity and not by the values of mutuality.

Cooperative surplus is a term used in doctrine and legislation to refer to the positive economic results that stem from the pursuit of a mutualistic scope by the cooperative. It corresponds to the difference between revenue and the costs of the cooperative transactions with its members. It is an amount that is temporarily paid as excess by the cooperators to the cooperative or underpaid by the cooperative to the cooperators, in exchange for their participation in the activity of the cooperative.[18]

In a general interest or social solidarity cooperative, it is possible that no surplus will be generated. As explained above, general interest cooperatives are not obligated to undertake cooperative transactions with their members as consumers, providers or workers. In the absence of cooperative transactions, there will be no cooperative surpluses.[19] If there is a cooperative surplus, it must be allocated to reserves and reinvested in the promotion of general interest. In addition, if a general interest cooperative or a social solidarity cooperative is wound up, its residual net assets must be transferred to another general interest cooperative or social solidarity cooperative. This is consistent with PECOL Principles (Chapter 3, Section 3.8. (2)), where residual net assets shall be allocated in accordance with the principle of disinterested distribution, e.g. distributed to the community or other associated cooperatives. It is also consistent with

[18] - See FAJARDO, G. & MEIRA, A., "Chapter 3- Cooperative Financial Structure. Commentary", In G. Fajardo, A. Fici, H. Henrÿ, D. Hiez, D. Meira, H. Münkner, and I. Snaith, (eds), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge, Intersentia, 2017, pp. 89, ff; and BANDEIRA, A. M., MEIRA, D. A. & ALVES, V. M., " Los diferentes tipos de resultados en las cooperativas portuguesas. Un estudio de caso multiple", *REVESCO - Revista de Estudios Cooperativos*, 123, 2017, pp. 37-63.

[19] - See HIEZ, D., "The general interest cooperatives: a challenge for cooperative law", pp. 106-108.

Article 8 Decree-Law No. 78/98, January 15th, which established that "where the cooperative in liquidation is not succeeded by a cooperative of the same branch, the application of the balance of the mandatory reserves will be allocated to another social solidarity cooperative, preferably from the same city, to be selected by a federation or confederation that represents the main activity of the cooperative."

5. Governance

In general interest cooperatives and social solidarity cooperatives, there are specificities in terms of governance. General interest cooperatives and social solidarity cooperatives often have a multi-stakeholder membership, including in their governance all the different categories of members: workers, volunteers, customers, private or public organizations.[20]

The involvement of multiple stakeholders in the ownership and governance of cooperatives is not straightforward. Two questions are raised: How can the interests of the different categories of members be reconciled? How can participatory and democratic governance be ensured?

In an ordinary cooperative, members give the cooperative a clear mandate to promote the economic interests of their members. The membership group is relatively homogeneous and all members, or at least the majority, are simultaneously owners and users of their cooperative enterprise. This allows the organisation to work under clear and relatively simple rules (e. g. one member, one vote).[21]

In cooperatives with different categories of members, heterogeneous membership groups are generated, requiring complex rules to avoid one category of members dominating the others, either in relation to the exercise of voting rights or participation in governance of the cooperative. Possible solutions include: ensuring that board composition reflects the composition of the membership; special rules to secure fair representation of each group of members in the governing and controlling bodies; different voting rights for different groups of members such as employees and users of services to ensure equitable representation of different member interests on the board.[22]

All of these solutions are embraced by the PECOL principles. According to Section 2.4.(8) "When necessary for the better functioning of a cooperative, cooperative statutes may confer plural votes not related to capital contribution, and reflecting, for example, (a) participation in cooperative transactions; (b) the number of members in particular subdivisions; or (c) the balanced representation of different member groups. Section 2.4(9) establishes that "When cooperative statutes exercise the option in paragraph (8), they must in any case ensure that investor members or a minority of co-operator members do not control the cooperative." Section 2.4(10) provides that "Total plural votes held by any co-operator member can never exceed a certain percentage of all members 'votes cast at any members' meeting at which they vote, as defined by the law. However, investor members may have plural votes according to

[20] - See HIEZ, D., "The general interest cooperatives: a challenge for cooperative law", pp. 105-106.

[21] - See MÜNKNER, H., "How co-operative are social co-operatives?", *CES - Cooperativismo e Economía Social*, 38, 2016, p. 54.

[22] - See MÜNKNER, H., "How co-operative are social co-operatives?", p. 54; SNAITH, I., "Chapter 2- Cooperative Governance. Commentary", In G. Fajardo, A. Fici, H. Henrÿ, D. Hiez, D. Meira, H. Münkner, and I. Snaith, (eds), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge, Intersentia, 2017, pp. 60, ff.

capital limited to a total of a certain percentage of votes." Section 2.4(12) says that "Decisions are made by simple majority of the votes cast but special majorities are required for the fundamental decisions defined in paragraph (5),[23] which are always made on the basis of one member one vote." Finally, Section 2.5(5) establishes that "Board composition, especially in general interest cooperatives, shall take into account the composition of the cooperative membership, including, for example, by geographical constituency or category of member."

Some of these solutions are not possible in the context of the Portuguese social solidarity cooperatives. In fact, in the Portuguese legal system, the plural vote will only be permitted in cooperatives with more than twenty (20) cooperators and if those cooperatives are not worker, handicraft, fish, consumer or social solidarity cooperatives (art. 41, No.1 of the *PCC*). Another governance issue for Portuguese social solidarity cooperatives concerns the rights of honorary members to vote and to be elected to the organs of the cooperative. As already pointed out, in this type of cooperative, we have two categories of members: the effective members who are simultaneously owners and users of their cooperative, and honorary members who are limited to contributing goods or services to the development of the objects of the cooperative. Article 5.3 of Decree-Law No. 78/98 establishes that honorary members enjoy the right to information in the same terms as the effective members, but they cannot elect or be elected to the corporate bodies, even though they may attend general meetings without the right to vote. Participation in governance with the right to vote at general meetings, is the exclusive right of effective members.

These restrictions on honorary members are a derogation from the second ICA principle of democratic member control. Compliance with cooperative principles is mandatory for the Portuguese legislator. So, this derogation should be removed in any future reform of cooperative legislation.

6. Cooperative audit

In general interest cooperatives and social solidarity cooperatives, there are specific issues relating to the terms of the cooperative audit. How do we measure the satisfaction of community interests? Or stakeholder involvement?

In mutual cooperatives, special instruments are required to measure success in terms of member-oriented effectiveness (promotion plan, promotion report) and special forms of audit are needed to measure aspects of internal and external control (financial and management audit).[24]

In the case of general interest cooperatives or social solidarity cooperatives, it is necessary to resort to additional instruments for measuring success, e.g. "social report."[25] In the context of these cooperative models, regulatory authorities may also play an important role in terms of audit.

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[23] - Fundamental decisions are decisions about restructuring or dissolving the cooperative, amending its statutes, participating in legal entities or groups, or establishing subsidiaries (Section 2.4(5)).

24 - See MÜNKNER, H., "Chapter 4 - Cooperative Audit. Commentary", In G. Fajardo, A. Fici, H. Henrÿ, D. Hiez, D. Meira, H. Münkner, and I. Snaith, (eds), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge, Intersentia, 2017, pp. 106, ff.

[25] - See TOMÉ, B., MEIRA, D. A. & BANDEIRA, A., "The Integrated Reporting and Corporate Social Responsability in the context of Social Economy (Mutual Association situated on the Health and Welfare Sector)". *CIRIEC-España, Revista de economía publica*, social y cooperativa, 85, 2015, pp. 109-142; and MÜNKNER, H., "How co-operative are social co-operatives?", p. 63, ff.

Under Portuguese law, there are no regulatory authorities for the cooperative sector or the social economy sector in general. Although it cannot be classified as a regulatory authority, António Sérgio Cooperative for Social Economy (CASES) exercises some regulatory powers, because its duties are to monitor and supervise the cooperative sector and its mode of operation. CASES was created by Decree-Law No. 282/2009 of 7 October 2009. It is a public interest cooperative that is responsible for overseeing the use of the cooperative format in compliance with the principles and rules concerning its incorporation and operation. Pursuant to Article 117, No.1 of the PCC, it is the responsibility of CASES to issue an annual credential attesting to the legal incorporation and proper functioning of the cooperative. In the case of social solidarity cooperatives, Article 9, No.1 of Decree-Law No. 78/98 states that this annual credential shall also confirm the purposes of social solidarity.

According to PECOL, in general interest cooperatives, the cooperative audit includes the manner in which the general interest has been pursued and stakeholder involvement in the cooperative (Section 4.2(1)).[26] In addition, as in ordinary cooperatives, the audit includes but is not limited to the volume of cooperative transactions with members and with non-members; the use and results of subsidiaries; member participation in cooperative governance; member democratic control of the cooperative; the composition of assets; the origin and allocation of the economic results; the amount of the indivisible and divisible reserves; the economic sustainability of the enterprise; the existence of practices of cooperation among cooperatives and cooperative social responsibility; and the level of engagement in cooperative education and training (Section 4.2(1)).

7. Conclusions

General interest cooperatives and Portuguese social solidarity cooperatives were both conceived as cooperative models whose driving force is not mutuality but altruism and solidarity. Rather than primarily addressing the needs of members, they are oriented towards the needs of the entire community.

In general interest cooperatives, membership is not a pre-condition to obtaining services and goods. In Portuguese social solidarity, cooperative membership is a pre-condition to obtain those services and goods. According to PECOL Principles, general interest cooperatives are not obligated to undertake cooperative transactions with their members as consumers, providers or workers. According to the Portuguese legislation, social solidarity cooperatives are obligated to undertake cooperative transactions with their effective members. So, in its current state, Portuguese cooperative law requires that social solidarity cooperatives must have a minimum mutualistic scope.

In general interest cooperatives and social solidarity cooperatives, the distribution of surplus among co-operators is prohibited, and all surpluses must revert to the cooperative reserves. In both cooperatives, residual net assets are allocated in accordance with the principle of disinterested distribution. General interest cooperatives and social solidarity cooperatives often have a multi-stakeholder membership, requiring specific rules relating to governance, so that the composition of the board reflects the composition of the membership and allowing different groups of members to have different voting rights. These rules are clearly expressed in the PECOL Principles, ensuring truly participatory and democratic

[26] - See MEIRA, D., "Portugal", In G. Fajardo, A. Fici, H. Henrÿ, D. Hiez, D. Meira, H. Münkner, and I. Snaith, (eds), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge, Intersentia, 2017, pp. 501-502.

governance. However, for Portuguese social solidarity cooperatives it is not possible to adopt plural voting and honorary members are deprived of the right to vote and the right to be elected to the organs of the cooperative. Finally, the cooperative audit in general interest cooperatives and social solidarity cooperatives must consider the manner in which the general interest is pursued and stakeholder involvement in the cooperative.

8. Bibliographical references

BANDEIRA, A. M., MEIRA, D. A. & ALVES, V. M., "Los diferentes tipos de resultados en las cooperativas portuguesas. Un estudio de caso múltiple". *REVESCO - Revista de Estudios Cooperativos*, 123, 2017, pp. 37-63. http://dx.doi.org/10.5209/REVE.54919

FAJARDO, G., FICI, A., HENRŸ, H., HIEZ, D., MÜNKNER & H., HIEZ, D., "El nuevo grupo de studio en derecho cooperativo europeo y el proyeto "Los principios de derecho cooperative europeo", *CIRIEC. Revista Jurídica de Economía Social y Cooperativa*, 24, 2013, pp. 331-350.

FAJARDO, G. & MEIRA, A., "Chapter 3 - Cooperative Financial Structure. Commentary", In G. Fajardo, A. Fici, H. Henrÿ, D. Hiez, D. Meira, H. Münkner, and I. Snaith, (eds), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge, Intersentia, 2017, pp. 73-95. https://doi.org/10.1017/9781780686073

FICI, A., "La funzione sociale delle cooperative: note di diritto comparato", *Verso un Diritto Dell'Economia Sociale. Teoria. Tendenze e Prospettive Italiane ed Europee*, Napoli: Editoriale Scienttifica, 2016, pp. 241- 263.

FICI, A., "Chapter 1- Definition and Objectives of Cooperatives. Commentary", In In G. Fajardo, A. Fici, H. Henrÿ, D. Hiez, D. Meira, H. Münkner, and I. Snaith, (eds), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge, Intersentia, 2017, pp. 19-45. https://doi.org/10.1017/9781780686073

HENRŸ, H., "Public International Cooperative Law: The International Labour Organization Promotion of Cooperatives Recommendation, 2002", In D. Cracogna, A. Fici and H. Henrÿ (eds), *International Handbook of Cooperative Law*, Heidelberg: Springer, 2013, pp. 65-88.

HIEZ, D., "Introduction", In G. Fajardo, A. Fici, H. Henrÿ, D. Hiez, D. Meira, H. Münkner, and I. Snaith, (eds), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge, Intersentia, 2017, pp. 1-45. https://doi.org/10.1017/9781780686073

HIEZ, D., "The general interest cooperatives: a challenge for cooperative law", *IJCL- International Jounal of Cooperative Law*, I, 2018, pp. 93-110.

MARGADO, A., "SCIC, Société coopérative d'intérêt collectif", RECMA - *Revue Internationale de l'économie sociale,* 284, 2002, pp. 19-30.

MEIRA, D., *O regime económico das cooperativas no Direito Português: o capital social*, Porto, Editora Vida Económica, 2009.

MEIRA, D. A., "As operações com terceiros no Direito Cooperativo Português (Comentário ao Acórdão do Supremo Tribunal de Justiça de 18 de Dezembro de 2007)", *Revista de Ciências Empresariais e Jurídicas*, 17, 2010, pp. 93-111.

MEIRA, D., "Portugal", In G. Fajardo, A. Fici, H. Henrÿ, D. Hiez, D. Meira, H. Münkner, and I. Snaith, (eds), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge, Intersentia, 2017, pp. 409-516. https://doi.org/10.1017/9781780686073

MÜNKNER, H., "How co-operative are social co-operatives?", *CES - Cooperativismo e Economía Social*, 38, 2016, pp. 33-75.

MÜNKNER, H., "Chapter 4 - Cooperative Audit. Commentary", In G. Fajardo, A. Fici, H. Henrÿ, D. Hiez, D. Meira, H. Münkner, and I. Snaith, (eds), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge, Intersentia, 2017, pp. 97-118. https://doi.org/10.1017/9781780686073

NAMORADO, R., *Os Princípios Cooperativos*, Coimbra, Fora do Texto, 1995.

NAMORADO, R., *Cooperatividade e Direito Cooperativo. Estudos e Pareceres*, Coimbra, Almedina, 2005.

NAMORADO, R., "Artigo 3.º", In D. Meira and M. E. Ramos (eds), *Código Cooperativo anotado*, Coimbra, Almedina, 2018, pp. 28-36.

RODRÍGUEZ, A. & ORTEGA, A, "Algunas consideraciones sobre las cooperativas de iniciativa social en el marco del fomento de empleo y la inserción laboral. una perspectiva jurídico-económica", *CIRIEC. Revista Jurídica de Economía Social y Cooperativa*, 19, 2008, pp. 57-78.

SNAITH, I., "Chapter 2- Cooperative Governance. Commentary", In G. Fajardo, A. Fici, H. Henrÿ, D. Hiez, D. Meira, H. Münkner, and I. Snaith, (eds), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge, Intersentia, 2017, pp. 47-72. https://doi.org/10.1017/9781780686073

THOMAS, A., "The Rise of Social Cooperatives in Italy", *Voluntas: International Journal of Voluntary and Nonprofit Organizations*, 15(3), 2004, pp 243-263. http://dx.doi.org/10.1023/B:VOLU.0000046280.06580.d8.

TOMÉ, B., MEIRA, D. A. & BANDEIRA, A., "The Integrated Reporting and Corporate Social Responsability in the context of Social Economy (Mutual Association situated on the Health and Welfare Sector)". *CIRIEC-España, Revista de economía publica*, social y cooperativa, 85, 2015, pp. 109-142.

EMPLOYMENT IN WORKER COOPERATIVES IN THE FRAMEWORK OF SPANISH COOPERATIVE LAW[1]

Aitor Bengoetxea Alkorta[2]
University of the Basque Country/ Euskal Herriko Unibertsitatea
Spain

SUMMARY: Abstract. 1.- Introduction. 2.- Types of employees in worker cooperatives: Worker-owners and salaried employees 3.- Working conditions in worker cooperatives 4.- Conclusions. 5.- Bibliography 6.- Legislative appendix

Abstract

Workers' cooperatives are created to provide jobs for their worker-owners. It is a formula enabling a group of people to obtain employment under a cooperative system through the creation of a jointly-owned company with democratic management, a company that can specialise in rendering any service or producing any good, as long as the principles of the cooperative are not violated.

However, some legal systems allow for the presence of salaried employees who are workers in cooperatives without being members. In this case, the working relationship between the cooperative and those employees is governed by ordinary labour law, known to be a field of law that developed in the sphere of the capital-labour conflict. In such a case, the cooperative is considered an ordinary employer; i.e., a common capitalist enterprise. This situates us before the paradox that, in the nineteenth century, workers' cooperatives were designed to surmount the exploitation suffered by wage-earners, while in the 21st century, we find - at least in form - the capital-labour relationship within these same cooperatives. In this regard, the question of employees' working conditions is also of interest, bearing in mind that a distinction must be drawn between the working conditions of the two groups mentioned above: member employees and salaried employees.

In the field of cooperative employment, comparative law offers widely divergent variations. Within the Spanish territory, there are systems in which labour law is applied to the worker-owners employed in a cooperative (Cooperatives Act of Extremadura), and systems where the working conditions of cooperative members are governed, in an absolute manner, by the self-management of the cooperative

[1] This article is based on the work BENGOETXEA ALKORTA, A. (2016), "La contribución de las cooperativas de trabajo asociado a la creación y mantenimiento de empleo", in FAJARDO GARCÍA, G. (Ed.), Aa.Vv., Cooperativa de trabajo asociado y estatuto jurídico de sus socios trabajadores, Valencia, Tirant lo Blanch.
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[2] Director of GEZKI (Gizarte Ekonomia eta Zuzenbide Kooperatiboaren Institutua/ Institute on Social Economy and Cooperative Law), Labour and Social Security Law Professor, University of the Basque Country/ Euskal Herriko Unibertsitatea

(Cooperatives Act of Navarre) – a self-management that should ideally be reflected in the internal regulations of the cooperative by statutes and internal rules on working conditions.

In the sphere of salaried employment, working conditions are set according to ordinary labour law: labour legislation, collective bargaining agreements and employment contracts. As stated above, in this area, the cooperative is treated as an ordinary capitalist employer, and the workers as ordinary employees.

There are several points of interest that are observable as to employment in workers' cooperatives:

- Reflection on the coexistence of workers subject to such different legal regimes within workers' cooperatives: worker-owners and salaried workers (workers who are not owners)
- Working conditions of worker-owners. It is of interest to reflect on self-management as the determinant for working conditions. On one hand, there is a risk of voluntary self-exploitation. On another hand, there is also a risk of very poor labour conditions, which facilitates the dynamics of pseudo-cooperatives, such that a principal capitalist company can create a fictitious cooperative it subcontracts at very low labour costs, legally but fraudulently covered by cooperative self-management.
- Working conditions of salaried workers. Conditions established according to labour law systems. Can cooperative principles and labour law be harmonised?

We face issues that deserve critical reflection within the broad field of legal requirements for employment in workers' cooperatives. It is a legal reflection we intend to make in developing this subject.

1.- Introduction

Worker cooperatives (henceforth WCs), are entities whose founding purpose is to provide work for the present and future worker-owners comprising them[3]. While other types of cooperatives are created to satisfy collective needs concerned with housing, consumption, education and other interests, the aim of the WC is to achieve self-employment for the people who give it life. Therefore, we are dealing with companies that associate people. In the case of the WC, the aim of such association is to achieve paid employment for them, which is why they are referred to as worker-owners. So, "it is precisely work that is associated (not capital, although the members also provide capital)" (GARCÍA, 2014, 115). It must thus be pointed out that WCs are woven around a nucleus of work association, where the capital provided by the worker-owners is an instrumental component. In contrast, capital companies, as their very name indicates, associate capital, and the paid employment hired turns out instrumental to the aim of achieving the profitability of the capital constituting the company.

That essential significance of employment in WCs is reflected in their strategic decisions, such that their priority is to uphold employment. In that regard, and in the present context of economic

[3] Worker cooperatives are those entities whose aim is to provide their members with jobs by means of their personal direct effort, part time or full time, by jointly organizing the production of goods or services for third parties (Art. 80.1 Cooperatives Act of Spain).

globalisation, it should be noted that, by their very nature, WCs do not relocate, as this would go against local employment, precisely their fundamental purpose[4].

This study will attempt to provide an overall view of the positive legal system of WCs in the Spanish state, bearing in mind the sixteen cooperative laws of its Autonomous Communities (for all of them, except for Canarias), as well as Spanish law. As far as the regulations of WCs are concerned, while a considerable degree of similarity can be observed between the diverse autonomous laws and state law, it is also true that the differences in some aspects are relevant (VALDÉS, 2010, 2). The study begins by seeking to show the characteristics of the two population groups within the WC: worker-owners and salaried employees. Afterwards, we will deal with the subject of working conditions in worker cooperatives. Full information about sections of the Cooperative Acts is provided in the legislative appendix at the end of this article.

2.- Types of employees in worker cooperatives: Worker-owners and salaried employees

An elementary classification of the types of employees leads us to make a distinction between salaried employees and self-employed workers. Employees can work for the private sector (for a company that pays them); or for a public institution (employment dependent on a public agency). Apart from this, self-employment can be individual, which is the case of self-employed individual workers; or associated, through a partnership agreement, and therefore collective (GAY/ BENGOETXEA, 2008, 485-486).

Worker cooperatives belong to this last category of collective self-employment arising from a partnership agreement.When focusing on those working in the WC, we must distinguish between cooperative employment and salaried employment. Thus, the actual workers of the WC are the worker-owners who constitute the company itself. Furthermore, the cooperative can operate as a conventional company and hire salaried employees[5].

2. 1 Worker-owners

These are the persons who have the dual status of owners and workers: owners because they hold a partnership agreement which gives life to the WC, and workers because they are obliged by that contract to provide their work to the cooperative that they have constituted. Of course, this is a "complex legal situation" (MONEREO, 2014, 18). This complex circumstance has given rise to in-depth debate in scientific doctrine and, to a lesser extent, in jurisprudence, with regard to the corporate, labour-related, or mixed nature of the legal relationship that binds the worker-owners to the WC.

At present, the debate seems to be settled by the categorical assertion in positive law that the relationship of worker-owners with the cooperative is corporate (Art. 80, Cooperatives Act of Spain).

[4] The WCs "combine and reconcile the responses to the challenges of globalisation with the commitment to maintain local employment" (Aa.Vv., *Social Economy in the EU*, 2012, 111).

[5] Cooperative law does not forbid hiring salaried employees. This is supported in detail by Art. 1.2 of the Workers' Statute (Royal Legislative Decree 1/1995, of 24th March): entrepreneurs are those who are natural or legal persons or jointly-owned capital receiving the supply of services involving features of salaried employment (volunteer work, subordinate labour, third-party employment, and compensation).

Sometimes, in specific autonomous legislation, the corporate nature of the link between the WC and the worker-owner is particularly emphasised[6], while other autonomous laws remain silent on the matter, and so neither deny such corporate nature nor establish the working patterns of this relationship[7].

Jurisprudence also seems to have settled the issue. As judgment of the Higher Court of Justice (STSJ) of Catalonia dated 29th July 2010 clearly explains, the main idea is that worker-owners are basically owners, as what links them to the WC is a genuine corporate civil contract. But this corporate relationship is influenced by the fact that, since they are not capitalist companies, the relationship of worker-owners with the entity that they co-own has strong labour-related connotations. This is why Spanish legislators, in successive laws, assign jurisdiction to the Labour Courts, to emphasise the contentious issues that arise between worker-owners and the WC they have created. This notwithstanding, what is certain is that the binding relationship between worker-owners and the cooperative company is corporate in nature, and any labour-related nature must be discarded as not even being concurrent with the aforementioned corporate nature[8].

In any case, the doctrinal debate revolves around the working patterns of the relationship. The relationship between worker-owners and the WC is discussed. We should understand that either these persons do not work for themselves but for the WC, or they are self-employed. Since worker-owners are joint owners of the company, the requirements for a relationship of third-party employment will never be completely fulfilled, and therefore we understand that such does not exist. Dependence is another element discussed. It is true that in large cooperatives, work is not self-managed, but dependent on the instructions issued by the WC. However, in small WCs, such dependence does not exist, and self-management is real[9].

Without denying the scientific interest of the question, it would appear that the clear establishment of the corporate nature of the relationship on the grounds of positive law entails a loss of interest in that once-fierce debate[10]. Hence, by virtue of the corporate nature of the link binding them to their WC, cooperative corporation law will apply to worker-owners, starting from the law on cooperatives, and subsequently being developed by the WC through such internal rules as statutes, internal regulations and General Assembly resolutions.

Thus, the working conditions of worker-owners are regulated by cooperative law. However, although we start from the application of cooperative and not labour law, on many occasions, cooperative legislation itself calls upon labour law, requesting its corroboration. In this matter, as far as the influence of labour law on the labour conditions of the worker-owners is concerned, cooperative legislation offers divergent models. We may encounter full self-management models for WCs that do not establish any guarantee stemming from labour law, such that working conditions are determined in internal cooperative

[6] Cooperatives Act of Andalusia, Aragón, Asturias, Cantabria, Castilla and León, Galicia, La Rioja, Madrid, Murcia and Valencia.

[7] Balearic Islands, Castilla-La Mancha, Catalonia, the Basque Country, Extremadura, Navarre.

[8] The Supreme Court has set the standard in this regard in the judgments (SSTS) of 23rd October, 2009; 13th July, 2009; 12th April, 2006; and 15th November, 2005.

[9] There are cases, such as in Aragón, the Basque Country, Cantabria, Catalonia or Valencia, in which the WC form is admitted with only two worker-owners participating.

[10] Defending the labour-based nature of the relationship, ÁLVAREZ 1975, MAIRAL, 2014, PEDRAJAS/ PRADOS, 1975, SANTIAGO, 1998.

rules of procedure, making it necessary to refer to the statutes, internal system regulations and resolutions approved by the General Assembly[11].

At the other extreme, we may find the labour rights guaranteed by law to the worker-owners fully applied[12]. And between both extremes we will encounter a variety of regulations guaranteeing certain labour rights regarding various aspects, such as minimum wage, working hours, breaks, holidays, temporary work suspensions, etc. On the jurisdictional side, legislators have clearly decided that labour courts have the competence on disputes regarding the supply of work between worker-owners and their WC[13].

2.2 Salaried employees

WCs can hire salaried employees through typical work contracts. In these cases, ordinary labour law will be fully applicable, subject to the nuance that attention will sometimes have to be paid to the specific provisions of cooperative law with respect to salaried employees. Focusing on the very nature of WCs based on cooperative self-employment, we share this categorical assertion: "it is not logical to hire salaried employees" (ALONSO, 1984, 540). As the WC is a peculiar company that lumps employment and cooperative values together, its responsibility is to provide jobs for its worker-owners, joint owners of the company they work in, under a democratic management model. When a WC hires salaried employees, it immerses itself fully in the field of labour law and, consequently, in a body of standards established around the logic of the conflict between capital and labour. In any event, all cooperative laws allow for WCs hiring employees, albeit always subject to quantitative limits, so that limits are set in proportion to the amount of cooperative employment. Thus, comparative cooperative law ranges from the hiring of salaried employees at a maximum of 25% of the hours worked per year by worker-owners (in the Basque Country) to 60% (in Cantabria)[14].

3.- Working conditions in worker cooperatives

Very often it is said that WCs offer stable quality and stable jobs. The Social Economy Act itself places the generation of stable quality jobs among the main guidelines for social economy entities, among which cooperatives stand out[15]. In this section, we shall endeavour to analyse the truth behind this statement.

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[11] We find such an extreme position in the Cooperatives Act of Navarre.

[12] This is the case of the Cooperatives Act of Extremadura, which, in Art. 115. 1 stipulates that working conditions of worker-owners shall be that established in the laws regulating salaried employment.

[13] Art. 2 c) of Act 36/2011, of 10th October, on Social Jurisdiction.

[14] The vast majority of autonomous laws establish a limit of 30% of hours per year as in national law. This is the case of Asturias, the Balearic Islands, Castilla-La Mancha, Castilla and León, Catalonia, Galicia, La Rioja, Madrid, Murcia, and Navarre. We find a peculiar case in Valencia, where it is established that *it is not possible to have more than ten per cent of workers with contracts of an indefinite duration calculated in relation to the total number of worker-owners, except for cooperatives that have under ten members, in which there can be workers hired in the aforementioned terms.*

[15] Art. 4 c) of Act 5/2011, of 29th March, on Social Economy.

3.1 ILO: Decent Work

The expression *decent work* has undergone substantial dissemination, especially after the Report of the Director General of the International Labour Organization (ILO), Juan Somavía, in 1999, precisely under the title of *Decent Work*. It should be pointed out that, from a terminological perspective, the original English phrase "decent work" refers to an acceptable job in accordance with common standards of reference[16]. Thus, the correctness of its translation into Spanish as *trabajo decente* is certainly arguable, as it has moral connotations which the original English expression does not contain. Therefore, it seems that its translation as *trabajo digno* would have been more accurate (GIL, 2012, 78 et seq).

Hence, decent work is a concept closely related to job quality and social justice and, in the last analysis, "condenses the historical aims of the ILO" in such a way that "it would be pertinent to speak of a rewording in simple, direct, easy-to-understand language of the message that the ILO has transmitted since it was founded" (GIL, 2012, 85).

In any case, we find ourselves before an undefined legal concept, a clear form of soft law, which does not appear in the more solemn declarations of the ILO, as in its Constitution (1919) or in the Declaration of Philadelphia (1944) (AUVERGNON, 2012, 123), although it does figure in the more recent Global Jobs Pact (1999) and in the Declaration on Social Justice for a Fair Globalization (2008). This soft-law aspect brings *decent work* closer to the ethical world, to the extent that it distances itself from the legal field, which, along with its virtual character as an international standard, leads to a perception of its weakness (SERVAIS, 2012). Obviously, if WCs wish to maintain an aura of quality employment, they must overcome the ILO's *decent work* test. In this regard, ILO Recommendation 193 rightly links decent work with cooperative work[17].

3.2 Stability in employment

Stability is often highlighted as the main indicator of quality in work. It is a principle stemming from labour law, the genuine "backbone of labour law" (BELTRAN DE HEREDIA, 2011). Thus, labour law puts considerable distance between itself and the liberal principles of *ius civilis*, from which it was emancipated, protecting the worker by impeding unjustified temporary employment and arbitrary dismissal or dismissal *ad nutum*.

If we examine the Spanish Constitution, we will observe that the principle of stability in employment is covered by the right to work provided for in Article 35.1. At the same time, this appears to clash with the freedom of enterprise established in Article 38.1 of the same text. The coexistence of both principles, in the opinion of the highest interpreting body of the Constitution, arises in such a way that both constitutional demands and international commitments establish the general principle of legal limitations to dismissal, while respecting the substantive and formal requirements to make dismissal legal. This does not mean that, as a corporate power, the authority to dismiss does not form part of the powers conceded by law to the entrepreneur for the management of his company and that, consequently, its regulation need not take into account the requirements deriving from the constitutional recognition of the freedom of enterprise and the safeguard of productivity. What is very clear, however, is that this freedom

[16] In its first version of 1999, this was understood as productive work under conditions of freedom, equity, safety and dignity, in which rights were protected, there was appropriate remuneration and social protection, and where tripartism and social dialogue were respected (GIL, 2012, 83).

[17] ILO Recommendation 193, on the promotion of cooperatives (2000).

of enterprise does not include absolute contractual freedom or a principle of freedom to dismiss *ad nutum*, given the requisite concordance that must be established between Articles 35.1 and 38 of the Constitution and, above all, the principle of a social and democratic rule of law. It must be borne in mind that since STC 22/1981 dated 2nd of July, F.J.8, the Constitutional Court has pointed out that, from an individual perspective, the right to work (Art. 35.1 of the Spanish Constitution) takes specific form in "the right to stability and continuity of employment, that is to say, in the right not to be dismissed without just cause" (STC 192/2003 F.J.4).

Setting aside labour law, the cradle of stability in employment, and analysing this principle from the viewpoint of the WC, it would seem obvious that this is a principle inherent to the very nature of WCs, as these were created with the precise intention of providing employment. So, "the common aspiration, when the company is constituted, of guaranteeing stability in employment determines, objectively, the commitment to the continuity of the organization that makes it possible" (JORDAN, 2002, 40).

3.2.1 Access to employment and stability

This section endeavours to analyse stability in the respective employments of worker-owners and salaried employees from the viewpoint of their mode of access to employment. As far as cooperative employment is concerned, access to the condition of worker-owner can lead to the status of permanent or temporary worker. In principle, cooperative legislation proposes the status of worker-owner with a fixed or indefinite contract as a natural formula, as would be expected in an employment model that boasts stability, but the door is open to temporary worker-owners. In order to reinforce the principle of stability in employment, the admission of temporary worker-owners should be based on justified cause. This occurs in only three cooperative laws, which require a temporary increase in the workload of the cooperative as a motive, with a minimum time interval of six months[18].

On the other hand, the legal system of non-causal temporary worker-owner recruitment into the cooperative is quite widespread, allowed for by the other cooperative laws[19]. I find this objectionable. When that door is opened, there is a risk for the principle of stability to fly out the window, due to the non-causal recruitment of worker-owners with a corporate relationship of limited duration into the WC, however quantitatively limited[20]. There is even a case where neither causality nor a quantitative limit exists[21]. As to the salaried employees of the WC, most cooperative laws establish a system that guarantees them the right to attain the status of worker-owners.[22]

[18] This is what we may observe in the Cooperatives Act of Andalusia, Asturias and La Rioja.

[19] A situation which we can find in the laws of Castilla and León, the Basque Country, and Murcia, in the regulations specifically governing WCs. In the other autonomous laws, the non-causality of temporary workers is deduced from the system of ordinary law for members in all types of cooperatives.

[20] Most laws establish that temporary worker-owners may not number more than a fifth of the permanent worker-owners. This is the standard in Spanish law, and in the laws of Aragón, the Basque Country, Extremadura, Madrid, Navarre and Valencia. The law in Murcia sets the limit at 30%. The law in Castilla-La Mancha sets the limit at one-third of the permanent owner-workers.

[21] Cooperatives Act of Cantabria.

[22] The law of Castilla-León does not guarantee this, but merely establishes a preference.

Cooperative law usually requires that they must be permanent salaried employees[23] who have been working for the WC for more than one year[24]. On numerous occasions, it exempts these persons from the trial period required to attain the status of permanent worker-owner[25]. These guarantees in favour of the conversion of salaried employees deserve to be valued positively. Although they were previously permanent employees, their transformation into worker-owners will bring about a rise in cooperative employment and a proportional decline in salaried employment.

Salaried employment in WCs should be eliminated or reduced to the maximum, so that all or the vast majority of workers are worker-owners. Why? Because cooperative law is a legal field adapted to the characteristics of WCs and opposed to what occurs in labour law, applicable to salaried employees, which responds to the logic of the conflict between capital and labour[26]. Salaried employees are hired by WCs under the legal system of labour law, with the quantitative limits we have observed above in section 2.2.

Therefore, we must turn to labour law to consider the dilemma between permanent and temporary salaried employees. At this point, it is obvious that, despite it being "the function of labour law to achieve objectives of stability in employment" (CASAS, 2012, 9), this has not been true for some time.

The deterioration of labour law, with special mention of the incisive labour reform of 2012, shows us that, despite it being "the function of labour law to establish the legal framework for the protection of jobs and workers" (CASAS, 2012, 9), "decrease in the protection of the weak contracting party in the field of labour law" is very clear (CRUZ, 2012, 49)[27].

This situation arises from a public policy that deliberately, though not explicitly, engages in "the search for productivity and competitiveness only in the reduction of rights and labour costs ... and not in quality" (CASAS, 2012, 10). Although formally speaking, the temporary hiring of salaried workers must have a motive, reality is stubborn and shows us – according to the latest information available – that, of the new contracts concluded, a mere 9.3% are permanent[28]. This leads us to conclude that we are witnessing a phenomenon in which "the temporary hiring of workers, by its non-causal use, has subverted its objectives" (CASAS, 2012, 6-7).

So, since the fatal decision to install a system of non-causal temporary hiring in 1984, which the law subsequently attempted to correct without success, "temporary hiring has been a structural problem of our labour market" (CASAS, 2012, 1). Without a doubt, this is borne out by the latest information provided by Eurostat, which shows, as a 2017 average, a temporary hiring rate of 22.4% in Spain as opposed to an average of 12.2% in EU-28, only surpassed by the Montenegro labour market with 24%. The explanation for this is to be found, above all, in massive fraud, particularly in the case of hiring for specific services, often used for situations of indefinite employment.

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[23] We find an exception in the law of Galicia, which does not expressly state that they must be permanent and only makes reference to *salaried employees.*

[24] One year in the laws of Andalusia, the Basque Country, Extremadura and Navarre; two years in the laws of Aragón, Castilla and León, Galicia and Madrid; three years in the laws of the Balearic Islands and Castilla-La Mancha; five in the law of La Rioja.

[25] This is the case of the cooperative laws of the Balearic Islands, Castilla-La Mancha, the Basque Country, Extremadura, Galicia, La Rioja, Madrid and Navarre.

[26] As we have remarked above in Section 2.2.

[27] As to the ever-present critical tenor of labour authors regarding successive labour reforms, always with a view to reducing the protection of workers, we make special mention of BAYLOS (2013); CASAS (2012); CRUZ (2012); PALOMEQUE (2013); SALA (2013); and VALDÉS (2013).

[28] Data of June 2018: 2,055,762 new contracts, of which only 192,972 were permanent (www.sepe.es).

In this situation where labour law allows for temporary hiring with much greater flexibility than that deriving from its very nature, what can be expected from WCs using the temporary hiring of employees is a moderate and strict use of this legal possibility, if they really intend to prove they practice policies to achieve quality in working conditions and employment stability.

3.2.2 Impact of the crisis on employment and stability

When crisis hits a WC or, to express it in labour law terms literally adopted by cooperative law, when there are difficulties arising from economic, technical, organizational, or production-related causes or force majeure, it will require a smaller workforce. In these situations, both cooperative and labour law take measures to suspend or terminate the relationships binding the WC and the workers it employs. When WCs must face the aforementioned economic, technical, organizational, or production-related causes or force majeure[29]cooperative laws establish that the General Assembly of the WC can take measures to suspend or terminate labour relations.

None of the cooperative laws – neither Spanish law nor autonomous laws – develop the concept of these four factors (COSTAS, 2013, 1249). It was thanks to Article 51 of the Workers' Statute and the jurisprudence and doctrine of labour law that the aforementioned concepts were developed. In this particular aspect, the law on cooperatives must follow that development of labour law (VILA, 2014, 152).

As we have stressed in the introduction to this study, employment, not market profit, is the fundamental purpose of the WC. Therefore, when the aforementioned factors exert pressure on cooperative employment, it is to be expected that the WC should always endeavour to adopt measures of internal flexibility, relegating the termination of cooperative employment to the condition of *ultima ratio*. In effect, this desirable WC modus operandi should also be observable in the field of salaried employment (VILA, 2014, 154). Thus, WC Assemblies often reach agreements on increasing working hours, reducing compensation, and, in general, worsening working conditions as a necessary sacrifice to preserve employment.

A harsh measure, albeit qualitatively different from termination, is temporary work suspension of the worker-owner. Thus, cooperative law contemplates suspension as a way of confronting the same circumstances (economic, technical, organizational, or production-related causes or force majeure) possibly leading to termination of employment[30]. Although the causes leading to both temporary suspension and termination of work are the same, attention must be paid to the severity of the cause as the key to choosing termination over suspension. In some cases, to allow for mere suspension, it is even required for the situation to jeopardise the business feasibility of the WC[31].

Cooperative legislation stresses the requirement that worker-owner job terminations (equivalent to dismissals) should be considered an unavoidable evil only with a view to preserving the continuity of the WCs themselves (COSTAS, 2013, 1249-1250; VILA, 2014, 155). Cooperative law attributes the adoption of resolutions to terminate the jobs of worker-owners to the WC General Assembly only when

[29] The Cooperatives Act of Aragón adds company succession to the causes.
[30] Particularly in Spanish law and in the laws of Aragón, Asturias, the Balearic Islands, Castilla-La Mancha, Castilla and León, Catalonia, the Basque Country, Extremadura, Galicia, La Rioja, and Murcia.
[31] The laws of Aragón and Murcia. In the law of Catalonia, these must be causes that substantially affect the proper operation of the cooperative.

this is a measure necessary to maintain the business feasibility of the cooperative itself[32]. In two cases, the legal regime is, we believe, quite rightly accentuated when referring to the severity of the aforementioned economic, technical, organizational, or production-related causes or force majeure[33].

When termination occurs, both relationships of the worker-owner are terminated: the corporate relationship and the labour relationship. As far as salaried employees are concerned, labour law allows WCs to resort to various internal flexibility measures, such as geographic mobility, functional mobility, substantial modification of working conditions (including wage cuts), non-application of the collective bargaining agreement, reduction of working hours, and temporary work suspensions.

What happens is that labour law does not guarantee that those measures alternative to dismissal should be applied preferentially, such that dismissal is the last means resorted to. This is why, to deal with economic, technical, organizational or production-related causes or force majeure, WCs are able to opt freely between modifying working conditions or dismissal. Furthermore, dismissal itself has been made easier[34] and cheaper[35] by the Labour Reform of 2012.

Jurisprudence corroborates the trivialization of dismissals and of the principle of stability in employment brought about by the current labour law. STS dated 20th September 2013 affirms that, in accordance with the law in force, it is not for the national courts to evaluate the causes of economic dismissals or test for proportionality in technical/legal terms, which entails appraising the absolute necessity of the decision taken, but rather, they pass more limited judgments as to the existence of the cause or alleged causes, their belonging to the legal type described in Article 51 of the Workers' Statute, and the suitability of the alleged cause in terms of business management, with a view to justifying the dismissals resolved.

3.3 The quality of working conditions

Above, we have seen the heterogeneity of cooperative laws regarding the working conditions of worker-owners with respect to the inclusion or non-inclusion of guarantees originating from labour law (Section 2.1). When the option taken is for WC self-management, there is a risk of permitting situations of self-exploitation with regard to working conditions (GARCÍA, 2014, 107-108; MOLINA, 2014, 56).

It seems excessive to suggest it is essential that the worker-owner should respect the labour law system en bloc. So, where is the insurmountable barrier that the working conditions of the worker-owners can not cross? We understand that we must look for it in the standards established by the ILO, particularly, with respect to the concept of "decent work" (GARCÍA, 2014, 116).

In that regard, we fully coincide with the standpoint of the ILO itself, along the lines of: (a) promoting the application of the core labour standards of the ILO and of the ILO Declaration on fundamental principles and rights at work for all workers of cooperatives without any distinction whatsoever; and (b) ensuring that cooperatives cannot be created or used to evade labour laws or to establish employment relationships in disguise, and fighting against pseudo-cooperatives that violate

[32] An element covered in most cooperative laws: Spanish law and the laws of Andalusia, Aragón, Asturias, the Balearic Islands, Cantabria, Castilla-La Mancha, Castilla and León, Catalonia, the Basque Country, Extremadura, La Rioja, Madrid and Murcia. The laws of Galicia, Navarre and Valencia remain silent on WC feasibility risks.

[33] The laws of Euskadi and Extremadura.

[34] On eliminating the historical requirement for administrative authorization for collective dismissals.

[35] The amount of the indemnity for wrongful dismissal was reduced from 45 to 33 days of wages per year in service.

workers' rights by ensuring that labour legislation is applied in all companies[36] (Recommendation 193/2000 ILO).

4.- Conclusions

When we study the subject of employment in workers' cooperatives, we must consider the paramount importance of the fact that we are dealing with companies whose existence is motivated precisely by their founding purpose of providing the worker-owners who incorporate them with employment. Employment in WCs revolves around the peculiar legal status of worker-owners. The relationship between these persons and their WC is corporate and the obligation to supply work arises from the corporate contract of each worker-owner. So, what we have are people with the dual status of joint owners of the WC on the basis of their capital contribution, while being workers in it.

The duration of the corporate and labour relationship is normally indefinite, but there may be temporary worker-owners. For the sake of the WC itself, and in order to assert its strength, the existence of temporary workers should only be permitted in the case of causes that justify such temporary nature, a condition required by few autonomous laws, with most laws being satisfied with establishing quantitative limits in proportion to permanent labour in cooperatives.

In the event of crisis motivated by economic, technical, organizational or production-related causes or force majeure leading to a workload reduction in a WC, it would be appropriate to attempt to overcome the situation by adopting internal flexibility measures, such as increased working hours, a reduction in pay, temporary work suspension, and so forth.

Cooperative laws very aptly take up the idea that terminating the jobs of worker-owners, equivalent to dismissal, is only valid when the situation is as serious as to regard the measure as necessary to maintaining the feasibility of the cooperative enterprise. Apart from cooperative employment represented by the worker-owners, WCs can hire salaried employees whose labour relationship is governed by labour law. In those cases, the WC acts as a conventional company that hires employees. Salaried employment, the legal regulation for which arises from the sphere of the capital-labour conflict, undermines the nature of WCs, based as they are on the collective commitment of worker-owners.

Should the WC need personnel other than its permanent worker-owners, it can resort to temporary worker-owners. If it hires salaried employees, it enters the field of labour law, which in principle is alien to cooperative law, with the dysfunctions this may entail, bearing in mind that the contemporary evolution of labour law shows a systematic and progressive reduction in workers' rights. In any event, it is reasonable to expect that WCs will not act in the manner of less scrupulous companies, hiring temporary salaried employees under precarious conditions or proceeding to arbitrary dismissals without just cause.

As regards the quality of cooperative employment and the working conditions of worker-owners, cooperative laws are very heterogeneous, ranging from pure self-management to the application of labour law to the worker-owners. Self-management can entail self-exploitation. In terms of inalienable minimum thresholds, ILO's concept of decent work, which revolves around common standards of reference in given contexts, could prove very appropriate.

Cooperative law must be very vigilant in fighting the authentic risk of pseudo-cooperatives. This is a phenomenon we may observe when a principal capitalist company creates a fictitious cooperative it

[36] I agree with application of labour legislation to salaried employees, subject to respect for self-management with regard to worker-owners.

subcontracts at very low labour costs to the detriment of its worker-owners, legally but fraudulently covered by cooperative self-management.

BIBLIOGRAPHY

Aa.Vv. (2000), *Economía Social y empleo en la UE,* Valencia, CIRIEC.

Aa.Vv. (2012), *La economía Social en la UE,* CESE-UE.

ALONSO SOTO, F. (1984), "Las relaciones laborales en las cooperativas en España", *Cívitas: Revista Española de Derecho del Trabajo*, 20.

ALVAREZ ALCOLEA, M. (1975), "La condición jurídico-laboral de los socios de las cooperativas de producción", *Revista de Política Social*, 107.

ALVAREZ CUESTA, H. (2008), *La precariedad laboral. Análisis y propuestas de solución*, Albacete, Bomarzo.

AUVERGNON, P. (2012), "De Declaración en Declaración de la OIT: El trabajo decente, lema de acompañamiento social de la globalización", *Relaciones Laborales*, 15-18.

BAYLOS GRAU, A.P. (2013): "La desconstitucionalización del trabajo en la reforma laboral del 2012", *Revista de Derecho Social*, 61.

BELTRAN DE HEREDIA RUIZ, I. (2010), "Estabilidad en el empleo, "flexiseguridad" y crisis: una aproximación desde la perspectiva de la eficiencia de las normas laborales", *Relaciones Laborales*, 17.

BELTRAN DE HEREDIA RUIZ, I. (2011), *La estabilidad en el empleo: un concepto al margen de la duración temporal o indefinida del contrato*, Aranzadi.

BENGOETXEA ALKORTA, A. (2016), "La contribución de las cooperativas de trabajo asociado a la creación y mantenimiento de empleo", in FAJARDO GARCÍA, G. (Ed.), Aa.Vv., *Cooperativa de trabajo asociado y estatuto jurídico de sus socios trabajadores*, Valencia, Tirant lo Blanch.

CABEZA PEREIRO, J. (1994), "Baixas obligatorias e suspensións colectivas –por causas económicas, tecnolóxicas e de forza mayor- dos sócios das cooperativas de trabalho asociado, e percepción de prestacións de desemprego", *Cooperativismo e Economia Social*, 9.

CASAS BAAMONDE, M.E. (2012), "Derecho del Trabajo y Empleo", *Relaciones Laborales*, 4.

COSTAS COMESAÑA, J. (2013), "Cooperativas de trabajo asociado", in Aa.Vv., *Tratado de derecho de cooperativas*, Valencia, Tirant lo Blanch.

CRUZ VILLALON, J. (2012), "Hacia una nueva concepción de la legislación laboral", *Temas Laborales*, 115.

CUEVAS GALLEGOS, J. (2011), *Las cooperativas de trabajo asociado: otra forma de creación de empleo*, Comares.

DE NIEVES NIETO, N. (2005), *Cooperativas de Trabajo Asociado: Aspectos Jurídico-Laborales*, Madrid, Consejo Económico y Social.

ESPIN SAEZ, M. (2009), *El socio trabajador. Criterios para sistematizar la realidad del autoempleo colectivo*, Madrid, Consejo Económico y Social.

FUENTES FERNÁNDEZ, F. (2002), "Las suspensiones de la relación de trabajo en las cooperativas de trabajo asociado", *Temas Laborales*, 64.

GARCÍA JIMÉNEZ, M. (2008), *Autoempleo: trabajo asociado y trabajo autónomo*, Tecnos.

GARCÍA JIMÉNEZ, M. (2014), "El desamparo del trabajo asociado por la legislación laboral o el limbo del trabajo cooperativizado", *Revista General de Derecho del Trabajo y de la Seguridad Social*, 37.

GAY HERRERO, S./ BENGOETXEA ALKORTA, A. (2008), "Aspectos laborales de la cooperativa", in MERINO HERNÁNDEZ (Ed.), Aa.Vv., *Manual de Derecho de Sociedades Cooperativas*, GEZKI (UPV)-CSCE, Vitoria-Gasteiz.

GIL Y GIL, J.L. (2012), "Concepto de trabajo decente", *Relaciones Laborales*, 15-18.

GOMEZ ABELLEIRA, F.J. (Coord.) (2014), *La temporalidad como problema jurídico. Diagnósticos y soluciones*, Valencia, Tirant lo Blanch.

GONZÁLEZ DE PATTO, R. (2000), "El nuevo régimen jurídico de las relaciones de trabajo en las cooperativas de trabajo asociado: ambivalencias en el proceso de laboralización del socio- trabajador", *Temas Laborales*, 53.

GONZALEZ DEL REY RODRÍGUEZ, I. (2008), *El trabajo asociado: cooperativas y otras sociedades de trabajo*, Aranzadi.

GUAMÁN HERNÁNDEZ, A. (Ed.) (2013), *Temporalidad y precariedad del trabajo asalariado: ¿el fin de la estabilidad laboral?*, Albacete, Bomarzo.

HIERRO HIERRO, F.J. (2003), "Las relaciones laborales en las cooperativas de trabajo asociado", *Aranzadi Social*, Vol. V.

JORDÁN RODRÍGUEZ, M. (2002), "Particularidades de las condiciones laborales en las empresas de trabajo asociado", *Revista CIRIEC*, 42.

LASSALETTA GARCÍA, P.J. (2010), *El acceso a la condición de socio en la sociedad cooperativa de trabajo asociado*, Madrid, Reus.

LÓPEZ GANDÍA, J. (2006), *Las cooperativas de trabajo asociado y la aplicación del Derecho del Trabajo*, Valencia, Tirant lo Blanch.

LÓPEZ MORA, F. (1999), "Problemática laboral de los socios trabajadores de las empresas de economía social: ¿socios o trabajadores?", *Revista CIRIEC*, 31.

LUJAN ALCARAZ, J. (1999), "El socio trabajador de las cooperativas de trabajo asociado en la Ley 27/1999, de 16 de julio, de cooperativas", *Aranzadi Social*, Vol. V.

MAIRAL JIMÉNEZ, M. (2014), "La doble relacion juridica del socio trabajador de la cooperativa de trabajo asociado: societaria y laboral", *Revista General de Derecho del Trabajo y de la Seguridad Social*, 37.

MOLINA NAVARRETE, C. (2014), "Las cooperativas como forma alternativa de creación de puestos de trabajo: el empleo cooperativo entre mitos y realidades", *Revista General de Derecho del Trabajo y de la Seguridad Social*, 37.

MONEREO PÉREZ, J.L. (2011), *La política de empleo como instrumento de lucha contra la precariedad laboral*, Albacete, Bomarzo.

MONEREO PÉREZ, J.L./ TRIGUERO MARTÍNEZ; L.A. (2014), "La configuración técnica de la relación laboral del socio trabajador de cooperativas de trabajo asociado", *Revista General de Derecho del Trabajo y de la Seguridad Social*, 37.

MONTOYA MELGAR, A. (1980), "Sobre el socio-trabajador en la cooperativa de trabajo asociado", in, AA.VV., *Estudios en Memoria del prof. Bayon Chacon*, Madrid, Tecnos.

MORGADO PANADERO, P. (2009), *Empleo, trabajo autónomo y economía social*, Comares.

MORGADO PANADERO, P. (2002), "El régimen laboral y de seguridad social de los socios trabajadores en las cooperativas de trabajo asociado", *Actualidad Laboral*, 28.

MORGADO PANADERO, P. (2002), "Las empresas de economía social y el Derecho del Trabajo", *Relaciones Laborales*, 2.

ORTIZ LALLANA, M.C. (1989), *La prestación laboral de los socios en las cooperativas de Trabajo Asociado*, Barcelona, Bosch.

PALOMEQUE LÓPEZ, M.C. (2013), "Una ruta bajo sospecha, hacia la creación de empleo a través de la facilitación y el abaratamiento de los despidos: acerca de la reforma laboral 2012 del Gobierno del Partido Popular", *Revista General de Derecho del Trabajo y de la Seguridad Social,* 34.

PAZ CANALEJO, N. (1981), "Las cooperativas y las relaciones laborales (Un análisis comparativo entre el ordenamiento laboral vigente y la proyectada reforma legislativa sobre el cooperativismo en España)", *Revista de Trabajo,* 61-62.

PEDRAJAS PÉREZ, F./ PRADOS DE REYES, F.J. (1975), "Notas sobre la caracterización jurídico-laboral de los servicios prestados por el socio empleado", *Revista de Trabajo,* 52.

PÉREZ REY, J. (2004), *Estabilidad en el empleo,* Trotta.

PURCALLA BONILLA, M.A/ PRECIADO DOMÈNECH, C.H. (2014), "Cooperativistas y trabajadores asociados: claves de la jurisprudencia y de la doctrina judicial más relevante", *Revista General de Derecho del Trabajo y de la Seguridad Social,* 37.

SALA FRANCO, T. (2013), "Puntos críticos para un debate sobre la reforma laboral de 2012", *Relaciones Laborales,* 10.

SANTIAGO REDONDO, K.M. (1998), *Socio de cooperativa y relación laboral*, Ibídem.

SERVAIS, J.M. (2012), "El trabajo decente: la visión de la OIT y su puesta en práctica", *Relaciones Laborales,* 15-18.

VALDÉS DAL-RE, F. (2010), "La cooperativa de trabajo asociado: una mirada desde las legislaciones estatal y autonómica", *Relaciones Laborales,* 19.

VALDÉS DAL-RÉ, F. (2013), "La reforma laboral de 2012 (Notas sobre su texto -sistemática interna y calidad técnica- y su contexto -la falta de correspondencia entre el objetivo proclamado y los objetivos realmente perseguidos-)", *Relaciones Laborales,* 2.

VARGAS VASSEROT, C. (2006), *La actividad cooperativizada y las relaciones de la cooperativa con sus socios y con terceros,* Aranzadi.

FRANCISCO VILA TIERNO, F. (2014), "Algunas notas en relación a la prestación de trabajo en las cooperativas. Una especial atención a las formas de extinción", *Revista General de Derecho del Trabajo y de la Seguridad Social,* 37.

LEGISLATIVE APPENDIX: COOPERATIVE LAWS

Cooperatives Act of Spain, Act 27/1999, of 16th July.

Cooperatives Act of Andalusia, Act 14/2011, of 23rd December.

Cooperatives Act of Aragón, Act 2/2014, of 29th August.

Cooperatives Act of Asturias, Act 4/2010, of 29th June.

Cooperatives Act of the Balearic Islands, Act 1/2003, of 20th March.

Cooperatives Act of Cantabria, Act 6/2013, of 6th November.

Cooperatives Act of Castilla-La Mancha, Act 11/2010, of 4th November.

Cooperatives Act of Castilla and León, Act 4/2002, of 11th April.

Cooperatives Act of the Basque Country, Act 4/1993, of 24th June.

Cooperatives Act of Catalonia, Act 12/2015, of 9th July.

Cooperatives Act of Extremadura, Act 2/1998, of 26th March.

Cooperatives Act of Galicia, Act 5/1998, of 18th December.

Cooperatives Act of La Rioja, Act 4/2001, of 2nd July.

Cooperatives Act of Madrid, Act 4/1999, of 30th March.

Cooperatives Act of Murcia, Act 8/2006, of 16th November.

Cooperatives Act of Navarre, Act 14/2006, of 11th December.

Cooperatives Act of Valencia, Act 2/2015, of 15th May.

Special Section: Cooperatives and other fields of law

LEGAL CONSEQUENCES OF INTRODUCTION OF ELEMENTS OF PUBLIC LAW INTO COOPERATIVE LAW – POLISH PERCEPTION

Dr. Dominik Bierecki

Cooperative Research Institute, Sopot

d.bierecki@krpj.pl

Poland

Abstract: The article considers the role of administrative law and the impact of state authorities on the shape of cooperative law in Poland. The establishment of legal norms introduces elements of public law into cooperative law. This article assesses these legal norms, including the regulation of credit unions and housing cooperatives. In addition, it considers a newly shaped model of membership in housing cooperatives in Polish law. This model assumes that membership can be created, *ex lege*, in isolation from the will of the member, if they acquire the right to occupy premises in a housing cooperative. This type of membership is an example of the Polish legislator using housing cooperatives to implement the public obligation to meet the housing needs of society.

Key words: cooperative law, public regulation, supervision, credit unions, housing cooperatives, Poland

I. Introduction

The cooperative movement and cooperative law have long traditions in Poland. The first Polish cooperative society was founded in 1816 and the first Polish Act on Cooperatives was introduced in 1920.[1] Since then, Poland had seen many structural kinds of cooperatives. Not all of these are related to the cooperative model based on the Rochdale Principles.[2] During the communist regime (1945 – 1989),

[1] See: J. Shaffer, *Historical Dictionary of the Cooperative Movement*, Lanham, Maryland – Toronto – Plymouth, UK, 1999, p. 337 – 338.

[2] See: A. Kurimoto, J. Draperi, J. Bancel, S. Novkovic, M. Wilson, L. Shaw, E. L. Cheney, D. Cracogna, in: *Guidance Notes to the Co – operative Principles*, Brussels, 2015; J. Birchall, in: *Co – operative Governance Fit to Build Resilience in the Face of Complexity*, Brussels, 2015, p. 25 – 35; P. Zakrzewski, *Zasady Międzynarodowego Związku Spółdzielczego [Principles of the International Cooperative Alliance]*, Kwartalnik Prawa Prywatnego, 2005, no. 1, p. 277; H. Cioch, *Zasady roczdelskie i ich realizacja w praktyce [Rochdale Principles and it's Practice Implementation]*, PAN Oddział w Lublinie. Teka Komisji Prawniczej, vol 2, Lublin, 2009, p. 29.

cooperatives were used as tools for the relegation of resources and were controlled by the communist government. Since the fall of communism, a rebirth of independent cooperatives has occurred. The establishment of the Polish credit union movement is the best example of this rebirth.[3] However cooperatives are still governed under the Act that was introduced during the communist regime (1982) and government interference with the autonomy of cooperatives can still legally take place.[4]

Under current law, government interference is most visible in the regulation of credit unions and housing cooperatives. These are both cooperative entities that the state perceives as executing public tasks. One legal source of this interference is the introduction of elements of public law into the cooperative law applicable to credit unions and housing cooperatives. In these cooperatives, formation and activity is regulated not only by private law regulations but also regulated by administrative norms. This is a manifestation of a wider phenomenon, recognized by Polish legal doctrine, where elements of public law are introduced into private law. In this situation, classic private law relationships are increasingly being regulated by administrative methods that are appropriate for public law.[5] This leads to a distortion of the nature of cooperatives, which in Poland have always been perceived as being the subject of private law relations.[6] In such relations, cooperatives remain autonomous with respect to other legal entities, and none of these entities may impose a specific order on them.[7] Such a situation expresses in a legal sense the principle of autonomy and independence of cooperatives. Where cooperatives are regulated by administrative norms, they become entities obliged to take or suspend certain activities. If such orders or prohibitions relate to the subject of the cooperative's activities and the possibility of associating in them, we are dealing with a violation of the autonomy of the cooperative. The purpose of this article is to discuss this occurrence in Polish law.

II. Credit unions regulation

The credit union movement in Poland was reborn in 1992. The original Polish credit union movement began in southern Poland in the 19th century. It was founded by Franciszek Stefczyk on the pattern of Friedrich Wilhelm Raiffeisen's financial cooperatives[8]. The first Act on credit unions was introduced in 1995. Currently, Polish credit unions operate under the 2009 Credit Unions Act (CUA). Article 2 of this Act explicitly states that a credit union is a cooperative and thus the general rules of cooperatives shall be applied to credit unions. These rules are expressed in the 1982 Polish Cooperative Act (PCA). Article 1 states that the cooperative is a voluntary association of an unlimited number of people with a variable composition of members and a variable share fund, which in the interest of its

[3] See: A. Jedliński, *Krajowa spółdzielcza kasa oszczędnościowo – kredytowa – zagadnienia konstrukcji prawnej [National Association of Cooperative Savings and Credit Unions – Legal Construction Issues]*, Sopot, 2001, p. 20 – 28.

[4] On Polish cooperative law see: A. Piechowski, in: *International Handbook of Cooperative Law*, edit. D. Cracogna, A. Fici, H. Henrÿ, Berlin – Heidelberg, 2013, p. 609 – 634.

[5] See: M. Safjan, in: *System Prawa Prywatnego, Prawo cywilne – część ogólna [Private Law System, Civil Law – General Part]*, vol. 1, edit. M. Safjan, Warsaw, 2012, p. 49 – 52.

[6] See: S. Grzybowski, *Prawo spółdzielcze w systemie porządku prawnego [Cooperative Law in the System of Law]*, Warsaw, 1976, *passim*; K. Pietrzykowski, *Powstanie i ustanie stosunku członkostwa w spółdzielni [Establishment and Termination of Membership in the Cooperative]*, Warsaw, 1990, *passim*; A. Jedliński, *Członkostwo w spółdzielczej kasie oszczędnościowo – kredytowej [Membership in the Credit Union]*, Warsaw, 2002, *passim*.

[7] See: S. Grzybowski, *Prawo spółdzielcze…*, p. 13 i n.

[8] J. Ossowski, *Jałmużna i kredyt [Alms and Credit]*, Sopot, 2005, *passim.*

members carries out joint economic activities.[9] This definition of a cooperative does not address the issue of cooperative autonomy. The CUA established the supervision of credit unions by the Financial Supervision Authority (FSA). The Polish legislator was guided by the scope of credit union activities as financial market entities. This has led to credit unions being subject to supervision that is more appropriate for other types of financial institutions, such as commercial and cooperative banks.

It should be noted that the supervision of credit unions is based on an international standard set by the World Council of Credit Unions (WOCCU).[10] It is understandable that external supervision of credit unions is required, particularly in relation to financial issues concerning the safety of members' deposits i.e. the capital to assets ratio, solvency ratio, liquidity ratio etc. However, the scope of the supervisor's powers in Poland raise some justifiable doubts. Under the FSA's supervision, credit unions in Poland require permission for formation and mergers (Articles 7 and 74a of CUA). Also, democratically elected members of the management board cannot perform their functions without firstly obtaining permission from the FSA. Administrative permission requirements apply to credit unions simultaneously with their obligations to register the formation or merger of a credit union by a civil court. This results in a situation where cooperatives that are credit unions are required to obtain the consent of two different state authorities (civil court and FSA).[11] Both of these authorities examine whether the formation or merger of a credit union meets the requirements set by substantive laws. Polish legal doctrine emphasizes that such a solution is not compatible with the rule of non-discrimination in social or economic life, as expressed by the Constitution of the Republic of Poland (Polish Constitution).[12]

The formation and merger of cooperatives that are credit unions takes place as a consequence of legal actions. As a result of the implementation of FSA supervision, the effectiveness of these activities depends on the consent of the central public administration authority, issued in the form of an administrative decision. Such a situation seems to violate the principles of voluntary association in a cooperative and autonomy of cooperatives. In addition, from a practical point of view, it reduces the

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[9] In the Polish doctrine of cooperative law, it was pointed out that the definition of a cooperative contained in Article 1 of PCA deviates from the definition of a cooperative approved by the ICA. H. Cioch proposed the introduction of the following definition of the cooperative in Polish law: *"The cooperative is voluntary and a self-governing association with a variable composition and a variable participation fund of an unlimited number of members who have been associated in order to cooperate in business to meet their economic, cultural and social aspirations and needs. The cooperative also conducts social activities for its members, their families and the local social environment"*. See: H. Cioch, *Prawo spółdzielcze [Cooperative Law]*, Warsaw, 2011, p. 33. Example to follow by the Polish legislator with changing the definition of cooperatives in Polish law may be the Principles of European Cooperative Law developed as a model of cooperative legislation and expressing the characteristics of cooperatives adopted in the International Cooperative Principles. Section 1.2. (2) of these Principles states that *"As autonomous organizations, cooperatives are free to govern themselves by their statutes within the limits of cooperative law".* See: A. Fici, in: *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge – Antwerp – Portland, 2017, p. 34 – 37.

[10] See: *Model Law for Credit Unions*, Washington, DC – Madison, Wisconsin, 2015, p. 50 – 58. On supervision of credit unions see also: R. Coelho, J. A. Mazzillo, J. Svoronos, T. Yu, *Regulation and supervision of financial cooperatives* [www.bis.org, access 23.04.2019].

[11] K. Pietrzykowski, *Charakterystyka nowych regulacji prawnych dotyczących spółdzielczych kas oszczędnościowo – kredytowych [Characteristics of New Legal Regulations Regarding Credit Unions]*, in: *Prawne i ekonomiczne determinanty rozwoju spółdzielczych kas oszczędnościowo – kredytowych w Polsce [Legal and Economic Determinants of Development of Credit Unions in Poland]*, edit. J. Ossowski, Sopot, 2010, p. 34. See also: D. Bierecki, *Członkostwo w spółdzielczej kasie oszczędnościowo – kredytowej [Membership in the Credit Union]*, Sopot, 2013, p. 51.

[12] A. Bałaban, *Nowe regulacje dotyczące kas spółdzielczych w świetle konstytucyjnej zasady państwa prawnego [New Regulations Regarding Credit Unions in the Light of the Constitutional Principle of the Rule of Law]*, in: *Prawne i ekonomiczne…,* p. 47.

attractiveness of cooperatives and consequently reduces their formation. It should be noted that the Polish legislator does not encourage the creation of cooperatives. Such a situation occurs not only in the context of the regulation of credit unions. An example of this was a regulation that enabled the transformation of a labor cooperative into a commercial law company. This regulation was repealed in 2019 as a consequence of the judgement issued by the Constitutional Tribunal[13] at 16th of June 2015 (K 25/12).[14] The judgement stated that the mentioned regulation does not comply with the constitutional rule of law, the constitutional freedom of association and the constitutional rule of property protection. However, it should be noted that in Polish law there has never been a corresponding regulation providing for the opposite effect, i.e. to enable the transformation of a commercial law company into a cooperative.

It is inconsistent with the second International Cooperative Principle i.e. democratic member control, to make the selection of a member of the credit union management board dependent on the consent of the FSA. This permission is required by Polish law for members of management boards of commercial banks and is intended to ensure the safety of customers' funds accumulated in banks. This kind of permission is also required for members of management board of cooperative banks, which can provide financial services for consumers other than their members. Credit unions in Poland on the other hand are entitled to provide financial services only to their members (Article 3 of CUA). All funds collected on deposit in credit unions belong exclusively to their members. A paradoxical situation arises, where the election of management board members by persons whose funds they will manage may be rendered ineffective by a decision of the FSA. The preservation of the quality of credit union services should not violate the credit union's autonomy.

Simultaneously with establishing the supervision of credit unions by the FSA, the CUA reduced the role of the National Association of Cooperative Savings and Credit Unions (NACSCU) in the credit union market. The CUA also established FSA supervision of the NACSCU. The NACSCU is a second tier cooperative association of credit unions in Poland. In the current legal state, NACSCU's role has been reduced from the supervision of cooperatives - enabling substantive correction of their activities, to limited control, consisting only of the examination and assessment of cooperative activities, but without the possibility of ordering their correction. Credit unions have no influence on the FSA, which is an administrative body. Until the CUA came into force, credit unions as members of the NACSCU, controlled this second level cooperative association according to general principles applicable to all cooperatives.

The FSA's supervision of credit unions should be carried out in a manner that is proportionate to the complexity and the scale of risk of the activity of the credit union (Article 60 of CUA). In addition, the supervision of credit unions and NACSCU should take into account the principles of supervision and corrective measures that take into account the scale of the credit union's activity, to ensure the application of milder measures where appropriate (Article 60a of CUA). The adequacy of supervision over cooperatives was analyzed by the Constitutional Tribunal. The regulations concerning limitations on the scale of supervision to correspond to the scope of the cooperative's activities (Articles 60 and 60a of CUA) were introduced as a result of the judgment issued by the Constitutional Tribunal, at 31st of July

[13] In Poland the Constitutional Tribunal is the court competent to issue a judgment causing the loss of power by the provision of the act in the event of its non-compliance with the Constitution (Article 190 of Polish Constitution).

[14] OTK-A 2015/6/82.

2015 (K 41/12).[15] In this judgment, the Tribunal decided that CUA regulations failed to limit supervision measures adequately to correspond to the cooperative's activities and were inconsistent with provisions of the Polish Constitution ensuring freedom of association and allowing freedom of economic activity to be limited only by way of statute and only where it was important to the public interest.[16]

III. Housing cooperatives regulation

Housing cooperatives meet a significant part of the housing needs of society in Poland. One Pole in three lives in premises in a housing cooperative building.[17] In these circumstances the Polish legislator has subjected housing cooperatives to control by the Minister responsible for construction, spatial planning and housing (Article 93a of the Polish Housing Cooperatives Act – HCA). The Minister has the right to request any information, data and documents regarding the organization and operation of a housing cooperative that is necessary to assess compliance with the law. In the case of a suspected violation of the law by a housing cooperative, the minister may apply to the appropriate cooperative association to which the housing cooperative is affiliated, or to the National Cooperative Council,[18] with a request to examine the legality, thrift and reliability of its entire operation (lustration – Article 91 of PCA). Article 93a of PCA was the subject of a Constitutional Tribunal study in its compliance with the constitutional catalog of competencies of the Council of Ministers. In the judgment of 15 July 2009 (K 64/07[19]), the Constitutional Tribunal did not find any inconsistency between Articles 93a of PCA and 146 of the Polish Constitution which sets the scope of competence of the Council of Ministers. However, a separate opinion was submitted in this judgment which stated that Article 93a of PCA constitutes an intolerable interference with the legislator, which is incompatible with the principle of a democratic state of law, contrary to the constitutionally protected status of a cooperative as a juridical person. The Polish Constitution does not give the Council of Ministers, or individual ministers, power to exercise administrative supervision of the activities of a cooperative. Due to the scope of supervisory powers under Article 93a of PCA exceeding the competence of a state administrative body in relation to a private legal person (in this case, a cooperative), the challenged provision (Article 93a PCA) is inconsistent with Article 2 of the Polish Constitution which establishes the principle of the rule of law in the Polish legal system.

The regulation of housing cooperatives had been the subject of many judgments of the Constitutional Tribunal. In terms of membership in a housing cooperative, the Constitutional Tribunal

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[15] OTK-A 2015/7/102.

[16] See: P. Pelc, *Nadzór Komisji Nadzoru Finansowego nad spółdzielczymi kasami oszczędnościowo – kredytowymi i Kasą Krajową oraz instrumenty nadzorcze Komisji w stosunku do kas i Kasy Krajowej [Supervision of the Financial Supervision Authority over Credit Unions and the National Association of Cooperative Savings and Credit Unions and Instruments of the Financial Supervision Authority Regarding Credit Unions and National Association of Cooperative Savings and Credit Union]*, in: *Prawo spółdzielcze. Zagadnienia materialnoprawne i procesowe [Cooperative Law. Substantive and Procedural Issues]*, edit. A. Herbet, J. Misztal – Konecka, P. Zakrzewski, Lublin, 2017, p. 233 – 261.

[17] A. Dragan, in: *Ruch spółdzielczy w Europie i instrumenty wsparcia [Cooperative Movement in Europe and Support Instruments]*, Warsaw, 2016, p. 14.

[18] The National Cooperative Council is a legal person established directly by PCA whose statutory duty is to act in the interest of the cooperative movement in Poland and on the international forum (Article 259 of PCA).

[19] OTK – A, 2009/7/110.

judgment issued on 5th of February 2015 (K 60/13),[20] has significant consequences. The Constitutional Tribunal ruled that the provisions of the HCA, to the extent that they allow membership in a housing cooperative to be held by persons who do not have the right to premises is inconsistent with the provisions of the Polish Constitution ensuring protection of property rights. According to this judgment, members of the housing cooperative who were not entitled to premises in the buildings of a cooperative, who held member rights, were impacting on the ownership rights of those members who were entitled to premises. The Constitution Tribunal ruled that no other person should be entitled to influence the housing cooperative activities of those that were entitled to premises. Because every cooperative member has corporate rights in a cooperative (i.e. voting rights and active and passive electoral rights to the cooperative associations) only members with rights to premises should be allowed to associate in a housing cooperative.[21] As a consequence of this judgment the Polish legislator was bound by Constitution to amend the HCA. The 2017 amendment of the HCA connected the right to membership with an entitlement to premises in the housing cooperative. Under current law membership in a housing cooperative arises, *ex lege*, as a consequence of acquiring a right to premises in a housing cooperative (Article 3 of HCA). Some of those rights are non-pecuniary rights to premises (dwellings, flats, habitations) so closely bonded with membership in a housing cooperative that they cannot exist without it. In those cases, acquisition of membership is required before acquiring the right to premises and cooperative statute restrictions on membership requirements shall apply. However, there are also other rights to premises in a housing cooperative which have a pecuniary character and can exist without membership in a housing cooperative. These rights burden housing cooperative premises as *iura in re aliena*. In case of acquiring such rights, membership in a housing cooperative arises *ex lege* and cooperative statute restrictions on membership requirements shall not apply. However, sale of this right results in the loss of membership in the housing cooperative.

The current model of membership in a housing cooperative may raise doubts as to compliance with the principle of voluntary membership.[22] It seems, however, that the establishment of an *ex lege* effect in the form of membership acquisition does not affect the issue of voluntary membership or coercion of membership in the cooperative, since there is no expression of will by the cooperative member regarding their membership in the housing cooperative. Binding membership in a housing cooperative with the right to the premises means that the autonomous will to acquire membership is expressed by the acquisition of the right to premises. In other words, the legal requirement to become a member of a housing cooperative becomes the right to the premises. However, this argument does not apply to persons who are entitled with a right formed as *iura in re aliena* on housing cooperatives premises, who *ex lege* have become members of housing cooperatives as a result of the changes to the HCA by the 2017 amendment. This latter situation seems to violate the principle of voluntary membership in a cooperative.

The 2017 HCA amendment introduced one more significant change, namely the abolition of the obligation to contribute to a housing cooperative. Housing cooperatives became non-share cooperatives.

[20] OTK-A 2015/2/11.

[21] Criticism of this position was voiced by P. Zakrzewski, *Spółdzielnie mieszkaniowe po zmianach z 2017 r. [Housing Cooperatives after the 2017 amendment]*, Kwartalnik Prawa Prywatnego, 2018, no 1, p. 181 – 182.

[22] See: P. Hoffman, in: *Spółdzielnie mieszkaniowe. Komentarz do nowelizacji [Housing Cooperatives. Comment on the Amendment]*, Warsaw, 2018, p. 48, 54.

The financing of their functioning is now based solely on fees paid by members for the maintenance of cooperative buildings and for costs related to social, educational and cultural activities conducted by the cooperative. These fees however should not be considered as cooperative capital.[23]

It can be argued that bonding membership rights with the right to premises is a manifestation of the introduction of elements of public law into cooperative law. Satisfying the housing needs of citizens is one of the public tasks of the state (Article 75 of Polish Constitution). Housing cooperatives can be considered to be entities that meet these needs. The legal definition of a housing cooperative in Polish law states that purpose of a housing cooperative is to meet the housing needs of their members (Article 1 of HCA). It can be argued that the formula for the acquisition of *ex lege* membership in a housing cooperative linked to the exclusion of any obligation to contribute to the cooperative, serves to enable the public task of meeting housing needs. This situation introduces an element of public law into cooperative law.

IV. Conclusion

This study of Polish regulations of credit unions and housing cooperatives leads to the conclusion that the Polish legislator has treated credit unions similarly to commercial and cooperative banks, bearing in mind the public functions of the financial market. Housing cooperatives on the other hand were primarily treated by the Polish legislator as entities that ensured the performance of the obligation of the state to satisfy the housing needs of society and subsequently as voluntary (quasi-public) organizations. In both examples we can see the increased implementation of elements of public law in the regulation of credit unions and housing cooperatives. The consequences of this phenomenon raise some doubt about the cooperative nature of each type of organization in the light of the International Cooperative Principles. It should be also noted that where administrative law standards limit the possibility of association, as in the case of credit unions, it increases the state's burden to meet the needs of society, when these needs can arguably be well met by private organizations with open membership, such as cooperatives.[24]

References:

1. A. Bałaban, *Nowe regulacje dotyczące kas spółdzielczych w świetle konstytucyjnej zasady państwa prawnego [New Regulations Regarding Credit Unions in the Light of the Constitutional Principle of the Rule of Law]*, in: *Prawne i ekonomiczne determinanty rozwoju spółdzielczych kas oszczędnościowo – kredytowych w Polsce [Legal and Economic Determinants of Development of Credit Unions in Poland]*, edit. J. Ossowski, Sopot, 2010;
2. A. Bałaban, *Orzecznictwo Trybunału Konstytucyjnego w zakresie spółdzielczości finansowej [The Jurisprudence of the Constitutional Tribunal in the Field of Financial Cooperatives]*, in: *Kierunki zmian prawa spółdzielczego w Polsce [Directions of Changes in Cooperative Law in Poland]*, Warsaw, 2014;

[23] See: P. Zakrzewski, *Spółdzielnie mieszkaniowe…*, p. 225.

[24] See: A. Bałaban, *Orzecznictwo Trybunału Konstytucyjnego w zakresie spółdzielczości finansowej [The Jurisprudence of the Constitutional Tribunal in the Field of Financial Cooperatives]*, in: *Kierunki zmian prawa spółdzielczego w Polsce [Directions of Changes in Cooperative Law in Poland]*, Warsaw, 2014, s. 149.

3. D. Bierecki, *Członkostwo w spółdzielczej kasie oszczędnościowo – kredytowej [Membership in the Credit Union]*, Sopot, 2013;
4. J. Birchall, in: *Co – operative Governance Fit to Build Resilience in the Face of Complexity*, Brussels, 2015;
5. H. Cioch, *Prawo spółdzielcze [Cooperative Law]*, Warsaw, 2011;
6. H. Cioch, *Zasady roczdelskie i ich realizacja w praktyce [Rochdale Principles and it's Practice Implementation]*, PAN Oddział w Lublinie. Teka Komisji Prawniczej, vol. 2, Lublin, 2009;
7. R. Coelho, J. A. Mazzillo, J. Svoronos, T. Yu, *Regulation and supervision of financial cooperatives* [www.bis.org, access 23.04.2019];
8. A. Dragan, in: *Ruch spółdzielczy w Europie i instrumenty wsparcia [Cooperative Movement in Europe and Support Instruments]*, Warsaw, 2016;
9. A. Fici, in: *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge – Antwerp – Portland, 2017;
10. S. Grzybowski, *Prawo spółdzielcze w systemie porządku prawnego [Cooperative Law in the System of Law]*, Warsaw, 1976;
11. P. Hoffman, in: *Spółdzielnie mieszkaniowe. Komentarz do nowelizacji [Housing Cooperatives. Comment on the Amendment]*, Warsaw, 2018;
12. A. Jedliński, *Członkostwo w spółdzielczej kasie oszczędnościowo – kredytowej [Membership in the Credit Union]*, Warsaw, 2002;
13. A. Jedliński, *Krajowa spółdzielcza kasa oszczędnościowo – kredytowa – zagadnienia konstrukcji prawnej [[National Association of Cooperative Savings and Credit Unions – Legal Construction Issues]*, Sopot, 2001;
14. A. Kurimoto, J. Draperi, J. Bancel, S. Novkovic, M. Wilson, L. Shaw, E. L. Cheney, D. Cracogna, in: *Guidance Notes to the Co – operative Principles*, Brussels, 2015;
15. *Model Law for Credit Unions*, Washington, DC – Madison, Wisconsin, 2015;
16. J. Ossowski, *Jałmużna i kredyt [Alms and Credit]*, Sopot, 2005;
17. P. Pelc, *Nadzór Komisji Nadzoru Finansowego nad spółdzielczymi kasami oszczędnościowo – kredytowymi i Kasą Krajową oraz instrumenty nadzorcze Komisji w stosunku do kas i Kasy Krajowej [Supervision of the Financial Supervision Authority over Credit Unions and the National Association of Cooperative Savings and Credit Unions and Instruments of the Financial Supervision Authority Regarding Credit Unions and National Association of Cooperative Savings and Credit Union]*, in: *Prawo spółdzielcze. Zagadnienia materialnoprawne i procesowe [Cooperative Law. Substantive and Procedural Issues]*, edit. A. Herbet, J. Misztal – Konecka, P. Zakrzewski, Lublin, 2017;

18. A. Piechowski, in: *International Handbook of Cooperative Law*, edit. D. Cracogna, A. Fici, H. Henrÿ, Berlin – Heidelberg, 2013;

19. K. Pietrzykowski, *Charakterystyka nowych regulacji prawnych dotyczących spółdzielczych kas oszczędnościowo – kredytowych [Characteristics of New Legal Regulations Regarding Credit Unions]*, in: *Prawne i ekonomiczne determinanty rozwoju spółdzielczych kas oszczędnościowo – kredytowych w Polsce [Legal and Economic Determinants of Development of Credit Unions in Poland]*, edit. J. Ossowski, Sopot, 2010;

20. K. Pietrzykowski, *Powstanie i ustanie stosunku członkostwa w spółdzielni [Establishment and Termination of Membership in the Cooperative]*, Warsaw, 1990;

21. M. Safjan, in: *System Prawa Prywatnego, Prawo cywilne – część ogólna [Private Law System, Civil Law – General Part]*, vol. 1, edit. M. Safjan, Warsaw, 2012;

22. J. Shaffer, *Historical Dictionary of the Cooperative Movement*, Lanham, Maryland – Toronto – Plymouth, UK, 1999;

23. P. Zakrzewski, *Zasady Międzynarodowego Związku Spółdzielczego [Principles of the International Cooperative Alliance]*, Kwartalni Prawa Prywatnego, 2005, no. 1.

Legislation

LEGAL PROVISIONS FOR SOCIAL AND SOLIDARITY ECONOMY ACTORS. THE CASE OF LAW 4430/2016 IN GREECE

Sofia Adam[1]

Heinrich Boell Foundation, Hellenic Open University

Greece

Abstract

The recent interest in Social Solidarity Economy has led to a proliferation of relevant laws in Europe. Greece has followed this trend with Law 4430/2016 on Social and Solidarity Economy and the development of its actors. This paper analyses the main provisions of this Law with regard to the scope, working definitions and legal entities eligible for registration as Social Solidarity Economy actors. The main intention is to open up the theoretical discussion on the legal entities which are entitled to be included in SSE and to explore the relevant debates on convergences and divergences between social solidarity economy and the cooperative sector. It also illustrates the difficulty of translating principles into legal provisions in the specific legal context of Greece with a highly fragmented cooperative legislation.

This paper is based on a research project implemented by Heinrich Boell Foundation Greece. The methodology is based on content analysis of relevant legal documents as well as the implementation of semi-structured interviews with relevant stakeholders (competent authorities, researchers, support organizations, national and international networks). The results demonstrate that despite good intentions, Law 4430/2016 does not manage to unite the diverse legal entities comprising the SSE sector under a common framework due to mainly two reasons: an internal misalignment within Law 4430/2016 concerning the different provisions for the legal persons automatically considered as SSE actors and other legal persons eligible for the legal status of an SSE actor; and an external misalignment between the criteria imposed by Law 4430/2016 and the legal frameworks of other legal persons belonging to the traditional social economy (associations, non-profit civil companies, agricultural cooperatives). The paper concludes with the necessity to follow a gradual approach of harmonization and unification based on a renewed cooperative legislation in Greece.

[1] Social Solidarity Economy Project Coordinator, Heinrich Boell Foundation Greece, Adjunct lecturer, Master Program on Social Solidarity Economy, Hellenic Open University, Contact details: +30 6977201279, sofia.adam@gr.boell.org , sof_adam77@yahoo.gr

Introduction

The recent interest in Social Solidarity Economy (SSE) has led to a proliferation of laws aiming to recognize the various constituents of this field, delineate the guiding principles according to which they should function and provide for specifically designed support measures for their promotion. In Europe, Greece has followed this tendency and introduced a law on Social Solidarity Economy (Law 4430/2016) after similar initiatives taken by France, Spain, Portugal and Luxemburg. The Greek Law has been received with ambivalent feelings among the main SSE actors and networks for a number of reasons. One of the most prevalent areas of dispute lies in the criteria imposed on legal entities in order to be officially recognized as SSE actors. The debate mostly concerns the potential exclusion of certain types of cooperative legal forms which follow other provisions according to their different legal framework. This issue raises an interesting line of inquiry concerning the boundaries of SSE in relation to the traditional cooperative movement. Are cooperatives considered to be inherently part of SSE? On what grounds is this position sustained?

This paper intends to address this question with reference to the case of Law 4430/2016 in Greece. In the first section, we will address the definition of social and solidarity economy. The two terms have been combined recently under the common denominator Social (and) Solidarity Economy but they still convey different meanings. The second section will examine the main areas of dispute concerning the inherent inclusion of all types of cooperatives within the spectrum of social and solidarity economy. Next, the paper will shed some light on the provisions of Greek Law 4430/2016 with regard to the criteria which need to be fulfilled for the recognition of a legal entity as SSE actor. The following two sections will provide an analysis of two areas of misalignment in the Greek Law with regard to SSE actors. Internal misalignment refers to incoherence between the provisions for legal persons introduced within Law 4430/2016 and the criteria imposed on other legal persons eligible to be registered as SSE actors. External misalignment refers to differences between the criteria imposed by Law 4430/2016 and the provisions specified by other pieces of mainly cooperative legislation (particularly agricultural cooperatives). The paper concludes with specific policy implications with regard to the potential amelioration of the SSE legal framework in Greece.

1. Social and/or Solidarity Economy

A terminological ambiguity characterizes a set of diverse practices that cannot be easily classified either in the public or in the private sector (Defourny, 2001). Keeping out of the picture the term and approach of the non-profit sector (Salamon & Anheier, 1992), we fill focus in the following on the convergences and divergences between the main concepts of social and/or solidarity economy.[2] Based on our prior work (Adam & Papatheodorou, 2010), we will adopt a structural approach which combines institutional forms and operational principles for the definition of the relevant terms.

Social economy includes all economic activities undertaken by enterprises, mainly cooperatives, associations and mutual societies, which adhere to the following principles: providing members or the community a service rather than generating profit, independent management, democratic decision-making, and priority given to persons and work over capital in the distribution of income.

[2] It is important to highlight that the use of the terms is different among the various geographical regions. The term solidarity economy emerged in the Latin American context and was transposed to France and the French-speaking Quebec of Canada with both of these countries also using extensively the term social economy.

Solidarity economy includes all economic activities which aim at the economic democratization on the basis of citizen participation and which involve a dual perspective: a) economic because they attempt to create economic relations based on reciprocity while making use of resources from the market and welfare state redistribution; and b) political because they attempt to create autonomous public spaces and open up discussion on both means and ends.

It is therefore significant to detect the main convergences and divergences between the two terms. They both refer to economic activities which do not follow the typical capitalist logic of profit maximization. However, the fact that the definition of social economy refers explicitly to economic activities undertaken by enterprises confers an institutional nuance in the relevant term. It implies a certain degree of reliance on market transactions and monetization whereas solidarity economy may more easily accommodate economic activities that are not related to a market activity and/or monetized. A second aspect, directly related to the first, is that solidarity economy does not only include legally recognized actors but also informal initiatives.

Both social and solidarity economy strive for economic democracy though adherence to the principles of independence and democratic decision-making procedures. The definition of the solidarity economy adds to the political element associated with the micro level (i.e. the modus operandi of a particular enterprise) the quest for a larger political project which entails a systemic social transformation. Therefore, another line of demarcation lies at the coexistence with or the need to surpass the existing socio-economic order. At least, this position is held by international networks such as RIPESS (RIPESS, 2015) and is acknowledged by international organizations (ILO, 2010). As such, solidarity economy can be seen as a social movement or a movement of movements (Kawano, 2010) with no blueprint on how to achieve socio-economic transformation; a process rather than a model of economic organizing (Miller, 2010) or an alternative to the existing development paradigm (Dacheux & Goujon, 2012).

Conceived as a social movement, solidarity economy unifies diverse practices through the following shared values (Miller, 2010; Kawano, 2010):

- Solidarity as an umbrella logic embracing cooperation, mutualism, gift-giving, altruism.
- Individual and collective well-being instead of profit and financial accumulation (buen-vivir).
- Economic and social justice along class but also race, gender, sexual orientation, physical abilities, etc.
- Sustainability considered as respectful and sustainable relations with our ecosystems.
- Robust or participatory democracy at the workplace and in the community based on self-management and collective ownership.
- Diversity and pluralism meaning a multiplicity of available paths towards equality and freedom.

From this perspective, social economy is seen as a distinct sector which may be or may be not part of this transformative project depending on the willingness of its actors to engage with the broader solidarity economy movement (Poirier, 2014). The case of France is indicative where the term social and solidarity economy has been used in regional consultations in order to foster links between accredited bodies of collective representation of social economy and solidarity economy networks. Increased interchange and dialogue led to the adoption of the term Social Solidarity Economy by the intercontinental network

RIPESS. This development denotes an intention to include both "social economy (cooperatives and mutuals) and solidarity economy (new initiatives - not necessarily cooperatives)" (Poirier, 2014, p. 12).

Therefore, Solidarity Economy intends to influence traditional social economy actors in the direction of effecting systemic changes based on the principles of solidarity, buen-vivir, justice, sustainability and democracy by promoting a set of diverse practices within a plural framework of the economy (Laville, 2013). The shared values of social movements are issues to be contested and debated within the framework of the political and democratic deliberations taking place within these movements. From the perspective of the state, the need for formal recognition of the diverse agents constituting social (and) solidarity economy gave birth to a series of laws for the recognition of Social and Solidarity Economy in Europe and elsewhere.

2. Cooperatives and Social Solidarity Economy actors

In this section, we will focus on cooperatives as a pars pro toto of traditional social economy actors.

According to Henry (2012), cooperatives as distinct types of enterprises are expected to be conducive to four main aspects of the sustainable development paradigm: economic security, social justice, ecological balance and political stability. The most relevant cooperative principle from the perspective of sustainable development (SD) is the democratic participation of cooperative members. However, other features are also at play. Table 1 reflects the main aspects of the cooperative identity which contribute to sustainable development.

Table 1: Features of the distinct cooperative identity which are conducive to sustainable development

Sustainable Developmen / Coop Identity	Economic security	Social Justice	Ecological Balance	Political Stability
Member-centered	Adaptability to changing circumstances	Members define needs and the way to satisfy them	Economy and ecology solutions	Preserving spaces of democratic deliberation
	Member loyalty	One member-one vote	Concern for a healthy environment	
	Low transaction costs	Not profit but surplus distribution based on transactions	Financial return on investment is not the priority, more environmentally friendly production	

			methods	
	Prefer surplus over profit	Appropriation of surplus for social security coverage		
Openness to new members		Increase in the number of constituents benefiting from the coop		
Indivisible reserves	Local stability		Intergenerational solidarity	
Audit mechanisms	Early signals			
Education		Information sharing		
Cooperation among coops	Collective guarantee funds		Pooling activities – less pollution	
Concern for the community/social audit			Ecological assessments	

Source: Henry, H. (2012). *Guidelines for Co-operative Legislation*, 3rd edition, ILO Geneva.

The previous analysis demonstrates why the main aspects of the distinct cooperative identity may be more conducive to general social well-being than capital-centered enterprises. However, there are no grounds to presuppose that cooperatives do strive for the fulfillment of these objectives, or more accurately that they are legally enforced to do so. What is of particular concern from the solidarity economy perspective outlined in the previous section is the organic incorporation of wider societal concerns in the everyday functioning of cooperatives.

These wider societal concerns are often equated with an explicit social character of the productive activity undertaken. However, this erroneously equates social (and) solidarity economy with a subsector of its actors, namely social enterprises, which can take various legal forms (not only social cooperatives). The EU impetus to treat social enterprises as the key social economy stakeholders[3] has contributed to this widely held misconception. Wider societal concerns do not necessarily mean the provision of general

[3] For example, see the Social Business Initiative (available at http://ec.europa.eu/growth/sectors/social-economy/enterprises_en, accessed 26/8/2018).

interest social services,[4] the work integration of vulnerable social groups and/or social cohesion of underprivileged local areas.

Wider societal concerns do imply certain directions for the operation of Social Solidarity Economy actors from a transformative perspective:

- The selection of productive activities according to the social needs of the relevant community and not simply on the grounds of market opportunities.
- A commitment to explore productive methods and technologies that, if not beneficial, at least do not harm the environment and do not lead to the depletion of natural resources.
- A price policy that takes into account the potential exclusion of certain social groups in need of the relevant products and/or services.
- Payment schemes that foster an equitable system within the members of the initiative but also in relation with the external environment (i.e suppliers).
- An orientation towards collaboration with other SSE initiatives towards building viable ecosystems.
- The involvement of all the constituencies affected by the operation of the particular initiative through formal inclusion in the ownership and/or decision-making procedures or through informal procedures such as periodic assessment of the impact enacted upon them based on relevant methodologies (i.e. social impact measurement).

These directions cannot be fully grasped by the international cooperative principles. The arguments put forward in order to defend the inherent social character of cooperatives (Roelants, 2017) merit a further discussion in this light. Cooperatives are considered inherently social because of their:

- Openness to new members (Principle 1). Yet, it is crucial to remember, as noted by Henry (2012), that open membership is rightfully subject to persons being able to use the services and willing to accept the responsibilities of membership and as such it cannot be equated with the inclusion of the wider interests of the relevant community where one cooperative resides.
- Obligation to hold profits in indivisible reserves which in case of liquidation are used for similar purposes and cannot be returned to members. Yet, it is important to note that this caveat implies more a commitment to the collective character of the enterprise than a real social use of accrued profits.
- Cooperation among cooperatives (Principle 6).
- Explicit concern for the community (Principle 7).

For these two last arguments, it is important to note again one illuminating point made by Henry (2012, p. 30): the internationally accepted cooperative values and principles "referred to in Paragraph 3 of ILO R. 193 and included in the Annex to ILO R. 193 help understand the definition (of a cooperative), but fall short of delivering sufficient elements for the formulation of legal principles which could guide the cooperative lawmaker" even more so in the context of the tendency of an international unification and "companization" of cooperative legislation.

[4] According to the official European Commission definition, social services of general interest include: social security, employment and training services, social housing, child care, long-term care and social assistance services (available at http://ec.europa.eu/social/main.jsp?catId=794, accessed 28/8/2018).

In this light, the problem of the legal recognition of the actors to be included in SSE is still open. As Dinerstein (2017) rightly argues, there is a problem of translation when the quest for social transformation is coded into legal frameworks. In the next section, we intend to shed some light on how the Greek Law on Social Solidarity Economy (Law 4430/2016) responded to the challenge of transforming principles into legal criteria and provisions.

3. Law on Social Solidarity Economy in Greece: turning principles into criteria

This contribution is based on a research project implemented within my mandate as Program Coordinator at Heinrich Boell Stiftung Greece aiming to identify and reflect on the consultation process and the main provisions of Law 4430/2016 in Greece (Adam et al, 2018). The methodology is based on the analysis of relevant legal documents, content analysis of all interventions implemented during the consultation process as well as the implementation of semi-structured interviews with the main stakeholders (including representatives of the competent ministry, of accredited international, national and local SSE networks, support organizations and scholars).

Law 4430/2016 titled Social and Solidarity Economy and the development of its actors is effective as of the 20th of October of 2016 and constitutes the general legal framework over all legal entities registered as Social and Solidarity Economy Actors in Greece. In this paper, we will focus our analysis on the first three articles of the Law, which specify the scope (art. 1), working definitions (art. 2) and the definition of Social and Solidarity Economy Actors (art. 3).

The Law endorses a normative approach which intends to incorporate the political aspirations put forward by the late developments in the SSE movement in Greece and abroad. In this framework, Social and Solidarity Economy is considered as a means for both the productive reconstruction of the Greek economy and for socio-economic transformation because of its inherent features which distinguish SSE practices from typical private for-profit enterprises aiming at the reproduction of their capital base and profit-maximization. As such, the law intends the diffusion of SSE practices in all potential fields of economic activity and the support of productive initiatives based on self-management and collective social entrepreneurship. In particular, the preamble endorses certain values related to the solidarity economy perspective since SSE is expected to foster the democratization not only of the economy, but also of society in general, and to create or consolidate institutions for social provisioning to all regardless of their financial status based on different principles than the price mechanism of the market.

With regard to the scope of productive activities envisaged, no exclusions are made explicit. All SSE actors[5] are requested to achieve a wider social benefit, which is defined as serving the social needs of the local or wider community by engaging in socially innovative practices, through activities related to sustainable development or the provision of general interest social services or social inclusion. Therefore, the three subcategories delineate to a certain extent the spectrum of productive activities to be undertaken by SSE entities. Sustainable development refers to the promotion of environmental sustainability, economic and social equality, gender equality, and the protection and development of the commons by placing emphasis on the particular needs of local communities. An indicative list of such activities is provided in order to exemplify the definition of sustainable development. This indicative list leaves ample

[5] Apart from Worker Cooperatives allowed to be registered as SSE actors only by pursuing collective benefit for their members-workers (art. 24).

room for engaging with a wide spectrum of activities. We could say that its normative direction expresses more a general political will to define SSE as an alternative paradigm rather than explicit provisions which can be clearly enforced and monitored. The other two sets of activities (provision of general interest social services and social inclusion) cover the main types of productive activities associated with social enterprises all over Europe.

According to Article 3, the Law makes a distinction between legal persons introduced within the framework of Law 4430/2016 which are automatically considered as SSE actors and other legal persons eligible for registration upon the fulfillment of certain criteria specific in the Law.

In the first category, we have:

- Social Cooperative Enterprises-SCEs (art. 14-23)
- Social Cooperatives of Limited Liability[6]
- Worker Cooperatives (art. 24-33)

In the second category, the Law specifies that any other legal person consisting of more than one member is eligible for registration, given that it fulfills cumulatively the following criteria (art.3 § 1, case d):

i. It explicitly strives for both collective and social benefit (as defined earlier).
ii. It takes due care for information-sharing and the participation of its members and applies a democratic decision-making system based on the principle "one person-one vote" irrespective of financial contribution.
iii. It foresees limited profit distribution according to the following rules: a) 5% of the profits are held in reserves; b) up to 35% is shared among the employees; and c) the rest is used for the creation of employment opportunities within the enterprise and the expansion of productive capacity.
iv. It applies convergence payment schemes according to which the highest salary cannot be greater than three times the minimum salary within the same enterprise unless otherwise decided by 2/3 of the members of the general assembly.
v. It strives for the empowerment of its economic activities and for the maximization of the produced social benefit through horizontal networking with other SSE actors.
vi. It is not founded and/or managed directly or indirectly by a legal entity of the strict or wider public sector and/or first/second level local authorities.

From the previous list of criteria, we can detect certain principles that adhere to the perspective of SSE movements in Greece and Europe. These include the quest for a wider social benefit rather than solely focusing on the collective benefit of members. The second criterion also extends the distinctiveness of the cooperative identity (namely democratic decision-making) to all SSE actors. The third criterion imposes limited profit distribution systems on all SSE actors but in a very specific manner as we shall see in the following. The fourth criterion intends to safeguard equitable payment schemes. The fifth criterion promotes networking among SSE actors as a constitutional goal. The last criterion delineates independence of SSE actors from the wider public sector.

[6] A pre-existing work integration social enterprise for people with mental health problems based on Law 2716/1999, art. 12.

In theory, Law 4430/2016 intends to unite the disparate legal forms usually adopted by the traditional social economy actors, namely the diverse types of cooperatives[7] as well as civil non-profit companies (GCC article 741), associations (GCC articles 78 – 106) and foundations (GCC article 108) under the registry of the Social Solidarity Economy and enforce a set of unified criteria for their operation. However, the criteria posed by Law 4430/2016 do not in practice unite these legal entities under a common guiding framework for mainly two reasons: a) a misalignment between the provisions specified for the legal entities introduced by Law 4430/2016 and the criteria imposed on any other legal entity to be registered as a SSE actor (internal misalignment); and b) a misalignment between the criteria imposed on any other legal person and the provisions foreseen by the respective legal frameworks of these legal persons (external misalignment). In the following two sections, we will explore in detail these two types of misalignment.

4. Internal misalignment

The quest for a convergence payment scheme within the SSE actor (criterion iv) could be considered as the transformation of a guiding Solidarity Economy principle into a legal criterion. The problem arising here is that by the very structure of art. 3 § 1, this criterion is not enforced on the legal persons treated automatically as SSE actors by Law 4430/2016, namely Social Cooperative Enterprises (SCEs), Social Cooperatives of Limited Liability and Worker Cooperatives. It could be argued that this criterion is not extended to these legal persons because other legal provisions counterbalance this omission. For example, there are thresholds with regard to the ability to hire employee non-members in both SCEs and Worker Cooperatives.[8] However, the quest for equitable payment schemes and the self-management principle should not be equated either in theory or in practice. Therefore, Law 4430/2016 does not pursue these principles in a coherent manner. Even though we understand the imposition of thresholds for worker non-members in the case of Worker Cooperatives, it is difficult to explain the different provisions between SCEs[9] and other legal entities active in similar fields of activity.[10] On the contrary, the other legal persons are required to enforce equal payment schemes even though these criteria are not posed in the case of SCEs and Worker Cooperatives.

The other case of internal misalignment is the criterion of horizontal networking (criterion v). If this criterion is to be enforced and audited legally, it might create a series of problems. First, the field of SSE actors is not so mature in Greece as to have numerous and/or well-established networks, unions, federations where one could join, let alone a variety of geographical and/or sector-relevant networks. Second, the imposition of this criterion only on the other legal entities may lead to a situation of hostage,

[7] These include: women's cooperatives (Law 921/1979), civil cooperatives (Law 1667/1986), credit cooperatives and cooperative banks (Law 2076/1992), social cooperatives of limited liability (Law 2716/1999, art. 12), agricultural cooperatives (Law 4384/2016), forest cooperative organizations (Law 4434/2016) and energy communities (Law 4513/2018).

[8] The threshold is set at 40% for employee non-members to the total number of employees in SCEs (art. 18) and 25% for worker non-members to the total number of members in Worker Cooperatives (art. 28 § 2). Exceptions can be granted following a procedure of written approval by the Registry and only for seasonal reasons.

[9] Two types of Social Cooperative Enterprises (SCE) are envisaged: social inclusion (further split into social inclusion of vulnerable and special social groups according to the type of their beneficiaries) and collective social benefit SCEs providing social services of general interest or engaging with sustainable development activities as defined by Law.

[10] It has been argued that the threshold of 40% worker non-members in SCEs poses extra and unnecessary operational challenges for SCEs active in the field of consumption and/or catering services.

where these legal entities are dependent on their admission to these networks in order to maintain their legal status while any SCE and/or Worker Cooperative might be inclined to express opportunistic behavior.

In any case, it is not clear why these criteria, if deemed significant for safeguarding SSE core principles against mission drift and institutional isomorphism, are not extended to all SSE actors within the same piece of legislation. The most probable explanation seems to be a technical one. The fact that the structure of the relevant article (art. 3) changed in the process of consultation, with the end result that certain criteria only apply to other legal entities and not to the ones considered automatically as SSE actors by Law 4430/2016.

5. External misalignment

Law 4430/2016 (art. 3 § 1) replicates the profit distribution system foreseen for Social Cooperative Enterprises and Worker Cooperatives to all other legal entities wishing to register as SSE actors. More importantly, the exact wording signifies an obligation to enforce this profit distribution system. As such, it is questionable whether traditional social economy actors are easily accommodated within this framework.

Legal persons that do not distribute profits at all should not be registered as SSE actors if Law 4430/2016 is to be interpreted stricto sensu. This is the case with civil non-profit companies (GCC article 741) and associations (GCC articles 78 – 106) which by their respective legal frameworks are not allowed to distribute any profits at all. The registration of civil non-profit companies as SSE actors is based on a loose interpretation of art. 3 § 3 considering that the limited profit distribution criterion of Law 4430/2016 is more than fulfilled with the stricter non-profit distribution constraint of these legal persons. In that case, however, the wording of the criterion should be indicative and not restrictive.

Further problems arise with regard to other types of cooperatives. In particular, Law 4384/2016[11] on agricultural cooperatives foresees a different limited profit distribution system than the one specified by Law 4430/2016. Law 4384/2016 makes a distinction between surplus and profit (art. 23 § 1), with the former being the positive result produced from transactions with members and the latter the positive result produced from transactions with non-members. Surplus is to be distributed as follows (art. 23 § 3): 10% is held in reserves until these equal the value of all cooperative shares. The rest is a) distributed among members based on their transactions with the cooperative, b) reinvested in the cooperative for its further development, c) directed towards the implementation of social purpose activities and sustainable development programs in the local community and d) used for the education of its members (at least 2% of the surplus should be directed towards educational activities). After-tax profits are to be held in reserves and/or used for the implementation of social purpose activities and sustainability programs for the local community (art. 23 § 4). Hence, the provisions of Law 4430/2016 with regard to profit distribution do not comply with the provisions of Law 4384/2016. This leaves existing and future agricultural cooperatives with the following puzzle. They will first have to be registered as agricultural cooperatives according to the provisions of their relevant legal framework and then apply for the legal status of an SSE actor by complying with the respective provisions of Law 4430/2016.

[11] The two laws, drafted within the same year (2016), serve as an illustrative example of the uncoordinated legislative process in Greece with regard to cooperatives.

The decision to frame profit distribution of all SSE actors according to the provisions of Social Cooperative Enterprises and Worker Cooperatives indicates the priority given by Law 4430/2016 to the legal persons introduced in this piece of legislation. In this light, the dual intention of Law 4430/2016 to both introduce legal persons and specify the criteria according to which any other legal entity can be registered as SSE actor falls short of the aspirations for two main reasons.

First, the Law bases all profit distribution systems on the specific operational model of worker cooperatives, with the associated alignment between members and workers as a guiding principle.[12] However, this specific organizational type may not, and often does not, cover the needs of other types of cooperatives created to fulfill other needs than the collective benefit of their members through paid work (producer cooperatives, consumer cooperatives and so forth).

Second, the previous analysis illustrates the problems posed by the fragmented cooperative legislation in Greece. Law 4430/2016 specifies unified criteria for the registration of SSE actors but is compelled to walk on unstable grounds given the disparate cooperative laws in Greece. The incompatibility among the two laws is not justified on specific policy intentions but can be explained by the fragmented cooperative legislation in Greece, a result in turn of the particular operation of the central government lacking a culture of collaboration and/or coordination enforcement mechanisms (Papageorgiou, 2016a).

The Greek cooperative legislation is far from what accredited scholars in the field define as a well-designed cooperative legislation: a general cooperative regulation with special regulations for specific types of cooperatives based on differences in the goods/services provided, the relations between the cooperative and its members (as in the case of the worker cooperatives) and/or the purpose pursued (as in the case of social cooperatives) (Fici, 2013, p. 13). On the contrary, what we are witnessing in Greece is a proliferation of cooperative legislative acts without serving the particular needs of diverse types of cooperatives (Papageorgiou, 2016a). More importantly, the disparate pieces of legislation (i.e. Law 4384/2016 on agricultural cooperatives) sometimes violate or do not endorse the international cooperative principles (Papageorgiou, 2016b) according to recent interpretations by the relevant international research community (Fajardo-Garcia et al, 2017) and/or the International Cooperative Alliance (ICA, 2015).

Hence the issue of whether supplementary criteria should be imposed on cooperatives to be registered as SSE actors in order to denote the transformative potential of these entities is a secondary issue given the fragmented picture of cooperative legislation in Greece. A general framework law on Social Solidarity Economy should normatively follow a process of harmonized interpretation of international cooperative principles in the framework of present challenges posed by globalization and in the direction of ensuring sustainable development objectives (Henrÿ, 2018) and a subsequent redrafting of cooperative legislation with general and special cooperative regulations according to the diverse needs of the diverse cooperative types. Had these preliminary steps been taken first, a law on SSE would have been a much easier task at hand.

[12] We use the term Worker Cooperatives with capital letters when we refer to the specific legal entity introduced by Law 4430/2016 and the term worker cooperatives with lower case when we refer to worker cooperatives as a specific organizational type of cooperatives.

6. Concluding remarks and policy implications

The preceding analysis has attempted to shed light on the challenges posed when principles are translated into legally enforced criteria with reference to the case of Law 4430/2016 in Greece. We started by highlighting convergences and divergences between the concepts of social and solidarity economy. From then on, we identified demarcation lines between the umbrella term of social solidarity economy and cooperatives. By doing so, we explained why there is not yet a solid base to guide law-making and transform principles into law-making provisions for SSE: a) international cooperative principles may not suffice to capture the wider societal concerns put forth by social solidarity economy as a transformative movement; b) these principles are not easily transformed into specific legal provisions; and c) cooperative legislation is different in each country, with the case of Greece being an example of a highly fragmented legislative culture not because of responding to different organizational needs.

Law 4430/2016 has attempted for the first time a bold move towards the formal recognition of all the constituent parts of SSE in Greece. It also attempted to identify the shared values and principles that are put forth in the current debates of the SSE movement in Greece and abroad. However, path dependency in law-making procedures and in particular a lack of coordination culture and enforcement mechanisms at the ministerial levels have not allowed for these aspirations to be satisfied in practice. We identified blockages in this process of unification which are mostly a matter of misalignment at two respective levels: a) between the provisions of legal entities specified within Law 4430/2016 and the criteria imposed on other legal persons to be registered as SSE actors; and b) between the criteria imposed by the different legal frameworks addressing the traditional social economy actors in Greece and the provisions of Law 4430/2016.

The case of Law 4430/2016 in Greece demonstrates that for reasons which do not follow from an adherence to the values and principles of SSE, law-making might lead to the exclusion of relevant legal actors for other reasons than safeguarding against mission drift. The resulting messy picture may create impediments for the diffusion of SSE practices despite initial good intentions.

It is more than urgent that the task of the unification and harmonization of cooperative legislation is undertaken in Greece with a dual purpose: a) to explore how the international cooperative principles can be transformed into legal provisions; and b) to renew the interest in cooperative legislation in order to safeguard the distinctiveness of the cooperative identity. This process should go hand in hand with a procedure of institutional consolidation where a clear mandate is given to the newly formed SSE Special Secretary to supervise and approve all relevant legislation in the field, meaning that no new legal framework is to be proposed without a clear check and balance of coherence among the various cooperative laws and with the overall strategy for the promotion of SSE in Greece.

If these steps are taken in a systematic and persistent manner, SSE initiatives and networks might be able to flourish and create their own, autonomous peer monitoring mechanisms and debate their values, principles and operational guidelines within their own procedures of democratic deliberation. It definitely needs two to tango. For the time being, we are still in the midst of numerous isolated dancers in the field.

References

Adam, S., Kavoulakos, K-I, Kornilakis, A. (2018). The legal framework of Social and Solidarity Economy in Greece. The experience of public consultation and a first assessment of Law 4430/2016, Thessaloniki: Heinrich Boell Stiftung, https://gr.boell.org/el/2018/07/17/thesmiko-plaisio-tis-koinonikis-allileggyas-oikonomias-stin-ellada (available in Greek).

Adam, S., Papatheodorou, C. (2010). "The involvement of social economy organizations in the fight against social exclusion: a critical perspective", in Studies Observatory of economic and social developments, Athens: Labour Institute, Greek General Confederation of Labour (available in Greek).

Dacheux, E., Goujon, D. (2012). "The solidarity economy: an alternative development strategy?", *International Social Sciences Journal*, Unesco, 62/203-204, pp. 205-215, http://www.socioeco.org/bdf_fiche-document-1959_en.html (accessed 25/8/2018).

Defourny, J. (2001). "Introduction: from third sector to social enterprise", in Carlo Borzaga and Jacques Defourny (eds), *The Emergence of Social Enterprise*, London and New York: Routledge.

Dinerstein, A. C, (2017). "Co-construction or prefiguration? The problem of the 'translation' of social and solidarity economy practices into policy", in Peter North and Molly Scott Cato (eds.), *Towards Just and Sustainable Economies*, Bristol, U. K.: Policy Press, University of Bristol, pp. 57-71.

Fajardo-García, G., Fici, A., Henrÿ, H., Hiez, D., Meira, D.A., Muenker, H.H., Snaith, I. (2017). *Principles of European Cooperative Law. Principles, commentaries and national reports*, Cambridge: Intersentia.

Fici, A. (2013). "An Introduction to Cooperative Law", in Dante Cracogna, Antonio Fici and Hagen Henrÿ (eds.), *International Handbook of Cooperative Law*, Verlag Berlin Heidelberg: Springer.

Henrÿ, H. (2018). "Trends in Cooperative Legislation: What Needs Harmonizing?", *Journal of Research on Trade, Management and Economic Development*, Vol. 5, No 1(9) , pp. 7-16 .

Henrÿ, H. (2012). *Guidelines for Co-operative Legislation*, 3rd edition, Geneva: ILO.

ICA (2015). "Guidance Notes to the cooperative principles", https://guides.co/g/guidance-notes-to-the-co-operative-principles/79707 (accessed 20/12/2018).

ILO (2010). "Social and Solidarity Economy: Building a Common Understanding", First edition of the ILO Social and Solidarity Economy Academy, 25 -29th October 2010, ITC ILO, Turin, Italy, https://www.ilo.org/global/topics/cooperatives/publications/WCMS_546398/lang--en/index.htm (accessed 20/8/2018).

Kawano, E. (2010). "Crisis and Opportunity: The Emerging Solidarity Economy Movement", in Emily Kawano, Thomas Ncal Masterson and Jonathan Teller-Elsberg (eds), *Solidarity Economy I: Building Alternatives for People and Planet*, Amherst, MA: Center for Popular Economics.

Laville, J-L. (2013). "The Social and Solidarity Economy. A Theoretical and Plural Framework", Draft Paper presented at prepared for the UNRISD Conference Potential and Limits of Social and Solidarity Economy, 6–8 May 2013, Geneva, Switzerland, http://www.unrisd.org/unrisd/website/document.nsf/(httpPublications)/228DBE3C0DE3D2D3C1257B5F00699C58?OpenDocument (accessed 18/8/2018).

Miller, E. (2010). "Solidarity Economy: Key Concepts and Issues", in Emily Kawano, Thomas Ncal Masterson and Jonathan Teller-Elsberg (eds), *Solidarity Economy I: Building Alternatives for People and Planet,* Amherst, MA: Center for Popular Economics.

Papageorgiou, K. (2016a). "Do they know what they want? Are they able to do it?", *Social Economy Journal*, January, http://isem-journal.blogspot.com/2016/01/blog-post_66.html (available in Greek, accessed 19/10/2018).

Papageorgiou, K. (2016b). "Provisions against the International Cooperative Principles in the new Law (4384/2016 on agricultural cooperatives)", *Social Economy Journal*, July, http://isem-journal.blogspot.com/2016/07/blog-post_89.html (available in Greek, accessed 19/10/2018).

Poirier, Y. (2014). "Social Solidarity Economy and related concepts. Origins and Definitions: An International Perspective", http://www.socioeco.org/bdf_fiche-document-3293_en.html (accessed 27/8/2018).

RIPESS (2015). "Global Vision for a Social Solidarity Economy: Convergences and Differences in Concepts, Definitions and Frameworks", http://www.ripess.org/ripess-releases-its-global-vision-of-sse/?lang=en (accessed 20/8/2018).

Roelants, B. (2017). "Technical Brief on the Greek SSE Law and Cooperative Legislation", http://www.cicopa.coop/publications/technical-brief-on-the-greek-sse-law-and-cooperative/ (accessed 20/8/2018).

Salamon, L. M., Anheier, H. K. (1992). "In Search of the Non-Profit Sector I: The Question of Definitions", *Voluntas: International Journal of Voluntary and Nonprofit Organizations*, 3 (2), pp.125-151.

Legislation

Law 2716/1999, art. 12, Social Cooperatives of Limited Liability.

Law 4384/2016, Agricultural Cooperatives, forms of collective organization of rural areas and other provisions.

Law 4430/2016, Social and Solidarity Economy and the development of its actors

General Civil Code, art. 76-106, Associations

General Civil Code, art. 108, Foundations

General Civil Code, art. 741, Civil Non-Profit Companies

NEW PERSPECTIVES FOR THE COOPERATIVISM OF RENEWABLE ENERGIES: LEGAL RECOGNITION AND PROMOTION

Gemma Fajardo[1]
University of Valencia
Spain

1. Introduction.

It is rightly said that energy is the driving force that keeps the world going and that the main sources of energy we use (oil and coal) are unsustainable due to their finite and contaminating characteristics. Apparently, 87% of the energy we consume is not renewable[2].
This framework fosters the need to develop other sources of energy that are renewable and in general sustainable, such as sun and wind.
If energy is important to keep the world going it is also important to know who controls energy production. Currently ownership of the main sources of energy belong to big companies, because huge resources are required to exploit an oil or coal field, to build a hydro-electric plant, to transform energy and distribute it.
Recourse to other sources of energy, such as sun, wind or common goods, which are not private property nor are located in a specific place but can be generated anywhere, raise new questions: is solar or wind power a resource which we all could have for generating electricity? Is it costly to generate electricity from these sources? Studies show that existing technology allows generation decentralization for these new energies at an affordable cost, mainly for private consumption in homes and SMEs[3].
This means that people, individually or, more easily, in partnerships, could generate the power needed for their consumption, without the need to transmit it, With the possibility of being able to store any surplus, as well as to feed it into their community network.

This context raises new opportunities for cooperativism, mainly self-consumers of energy from renewable sources, but this paraigm change would also mean that large power companies would lose part of the control they currently have over power generation and distribution. Legislation provides that the actors in the energy sector are large companies and do not allow and hinder the participation of citizens (Huybrechts, 2017). We find ourselves, therefore, facing a conflict of interests which can only be resolved politically[4].

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[1] Professor of Commercial Law, University of Valencia.

[2] PRIETO, P. "En la encrucijada entre las energías fósiles y las energías renovables", *La energía. Retos y problemas*. Economistas sin Fronteras, nº 24, Invierno, 2017, p. 11.

[3] GREENPEACE-España. *Energía Colaborativa. El poder de la ciudadanía de crear, compartir y gestionar renovables*. September 2017, p. 4).

[4] That conflict of interest is also appreciated because companies benefit from increased energy consumption, while consumer cooperatives promote energy savings (GREENPEACE-España. *Energía Colaborativa. El poder de la ciudadanía de crear, compartir y gestionar renovables*. September 2017, p. 7).

The need to promote renewable energy is unquestionable, given the finite nature of current energy sources, besides other reasons; the question raised is whether this promotion is also being directed at citizens, and if public policies are committed to decentralized generation of renewables and self-consumption? It is said that self-consumption contributes to making energy systems democratic, and this self-consumption may develop in several ways, one of which is cooperativism[5].

In this study we have attempted to discover whether the legal framework(s) existing in the European Union promotes renewable energy and in particular, whether it promotes the democratization of energy and self-consumption on a cooperative basis?

2. The promotion of renewables in the European Union.

The UN Resolution A/RES/70/1 on Transforming our world: the 2030 Agenda for Sustainable Development, adopted in September 2015 has amongst its goals to ensure access to affordable, reliable, sustainable and modern energy for all by 2030 (Goal 7), which implies among other goals, to substantially increase the percentage of renewable energy in the global energy mix.
Along the same lines, the European Union, also due to its internationally assumed commitments, has been promoting electricity generated from renewables, as a contribution to the reduction in greenhouse gas emissions. It should be pointed out that energy from renewable sources is understood as that from non-fossil renewable sources, such as wind, solar, geothermal, aerothermal, hydrothermal and sea power, hydraulic, biomass, landfill gases, sewage plant gases and biogas.

The first regulations issued for promoting renewables in the European Union were **Directive 2001/77/CE and Directive 2003/30/CE** mainly aimed at fostering the increase in the contribution of renewables in the European Union (21% of total consumption by 2020) but using indicative criteria without establishing binding targets. Later however, the need was envisaged for these targets to be obligatory for States because on making them obligatory not only did it favour compliance, but also it provided security for investors and promoted the development of the necessary technology[6].

Currently, the common European framework for fostering renewables is contained in **Directive (EU) 2018/2001**, which replaces the previous ones. This regulation establishes obligatory national targets with reference to the energy quota in gross final consumption and transmission which must come from said sources and establishes measures to foster them.

The directive recognizes that energy production from renewable sources offers many advantages such as the reduction of non-reneable and polluting sources of energy, and can enable decentralized production by SMEs with proper technology. Decentralized production uses local energy sources; provides greater local supply security; the distances travelled are shorter and energy transmission losses are lessened; it

[5] Numerous studies have demonstrated the suitability of the cooperative model to give legal cover to energy development projects: VIARDOT (2013); YILDIZ (2014); WIRTH (2014); SAGEBIEL, MULLER , ROMMEL (2014); YILDIZ, ROMMEL, DEBOR and others (2015) or SAHOVIC & PEREIRA (2016).

[6] More broadly on the evolution of the European policy on renewable energy, see SOLORIO, I. *La política europea de renovables y su influencia en España y Reino Unido*. Fundación Alternativas. Estudios de Progreso, nº 80/2014, pp. 11-17.

promotes technological development and innovation and generates major opportunities for growth and employment at local level.

In consideration of the advantages of decentralized production of renewables, the Directive requires States to adopt support measures for these initiatives, providing promoters with detailed information about processing requests for authorization, certification and licensing for renewable energy facilities and about available grants; instituting simplified and less onerous authorization procedures for smaller scale projects and for decentralized equipment for energy production, and in general regulating the authorization, certification and granting of licences with objective, transparent and proportionate rules and ones which do not discriminate among applicants.

Notwithstanding, these measures are not considered enough to meet the commitments undertaken in the 2015 Paris Agreement. Investment in renewables fell by 60% between 2011 and 2015, due to the legal insecurity that its regulatory framework generates. Lack of ambition by the Commission and scant support for renewables in general are reported. It must not be forgotten that, although EU Member States, by virtue of the Treaty of Lisbon (2007) assumed powers in energy matters and in particular to promote renewables, they still maintain the right to determine the general structure of their energy supply and to choose **among** various energy sources (art. 194.2 TFEU).

3. Fostering renewables and self-consumption in European Union countries. An uneven framework.

As a consequence of the legal framework described above, and the freedom of Member States to determine their energy supply sources, energy policies adopted by different States have been diverse, rendering the resultant as an uneven framework.

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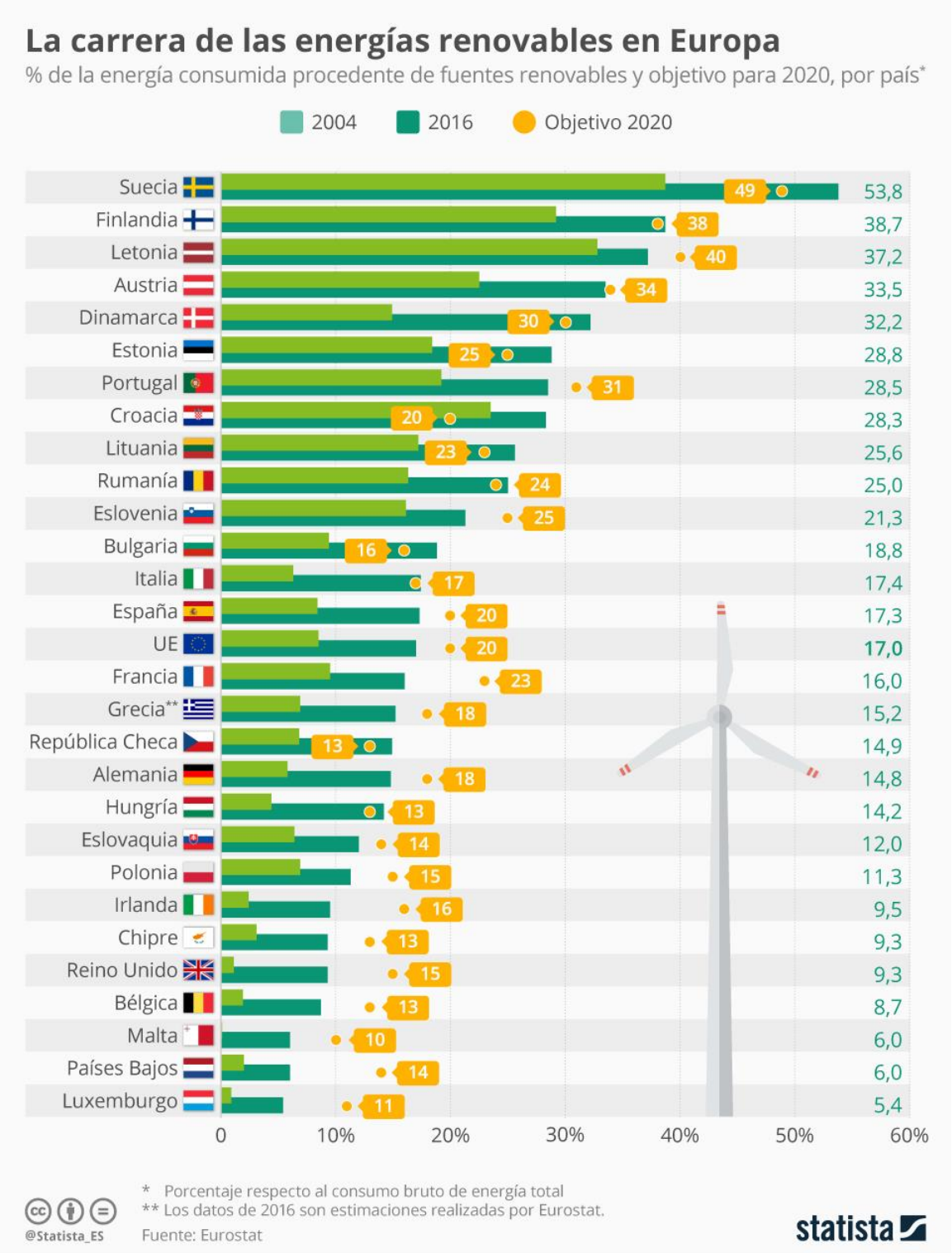
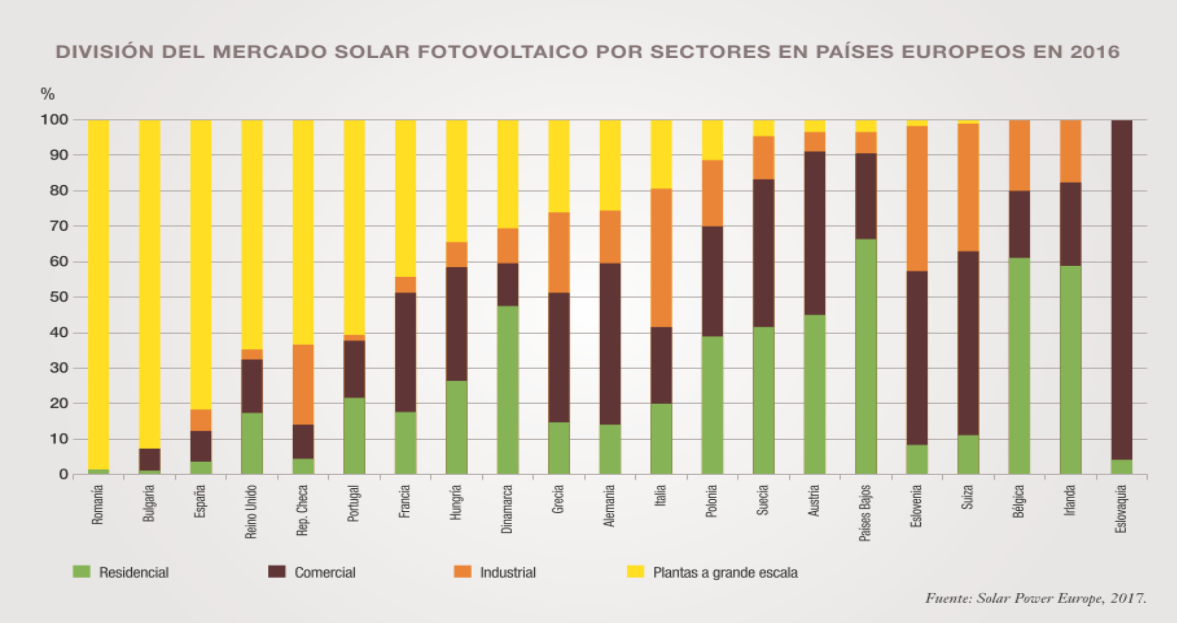
Table 1 shows the various renewable energy consumption targets in the different Member States by 2020 and the results reached in 2016 (according to estimates by Eurostat). So, for example, Sweden has a target for 2020 to cover 49% of its consumption with renewable energy, in 2016 it had already exceeded that target by almost 5 points; meanwhile, Luxembourg, which set a target of 11%, has not even reached half of that.

Table 1. *The race for renewable energies in Europe (% of energy consumed from renewable sources and target for 2020 by country*).



On the other hand, it must be borne in mind that the renewable energy generation system does not always favour decentralization production and private consumption. Table 2 shows how photovoltaic electricity in each State varies according to the nature of production – whether residential or at large-scale production plants.

Table 2. *Division of the solar photovoltaic market by sectors in European countries in 2016*



Residential production will normally be linked to self-consumption, although so can commercial and industrial production. Production at large-scale plants is usually owned by investors and is not linked to self-consumption. This table shows the difference between the Netherlands (Los Paises Bajos) , where the majority of photovoltaic solar production is residential, and Spain (España), where most production is at large-scale plants and residential production is insignificant.

4. New perspectives after passing the Clean Energy for all Europeans Communication in 2016.

The situation generated is not satisfactory because it does not favour the energy transition process and because it is very uneven across the Member States. For this reason, the European Union has set out new challenges.

Thus, recently, the Commission, via the **"Clean Energy for all Europeans" Communication of 30 November 2016,** has passed a wide range of measures with which it intends to accelerate both the transition to clean energy and growth in employment. Among the measures are to be found several legislative proposals relating to energy efficiency, renewables, the shaping of the electricity market, supply security and the regulations governing the Energy Union[7].

[7] An analysis of the consequences that the approval of these measures will have for the legal management of the energy transition in the European Union can be seen in ZAMORA (2018).

This set of measures pursues three main aims: putting energy efficiency first; achieving world leadership in matters of renewables and offering fair treatment to consumers.

In this respect, the Commission proposes to reform the energy market in order to empower consumers and enable them to control their energy options better, which involves not only being able to control their energy costs better, but also having the possibility of playing a more active role in this market. The Communication expressly contemplates consumers producing, storing, sharing, consuming and selling their own energy in the marketplace, and them being able to do so directly, or via "energy cooperatives" or other formulas.

This legal framework opens up important prospects to individuals and professionals to be able to actively take part in the energy sector, and to do so via cooperative organizations, either as consumers, or producers, or as service providers to the above. But in particular, at this moment, we are interested to know more about the possibilities of setting up self-consumer cooperatives or "prosumers", that is cooperatives made up of persons or SMEs that produce and consume their own energy and who can also store or sell any excess in the marketplace.

4.1. Citizen participation in renewables from a legal perspective.

Responding to the aforementioned targets, directive proposals have been submitted from both the European Parliament and the Council, adopted on 23 February 2017, which include the announced developments.

On the one hand, the recast Proposed Directive on the promotion of the use of energy from renewable sources (COM (2016) 767 final); and on the other, the Proposed Directive, also recast, on common rules for the internal market in electricity (COM (2016) 864 final).

The first Proposal (PDFER) substantially modified the Directive on renewables (2009/28/EC)[8]; while the second (PDMIE) modifies and recasts the Regulation of electricity (R. 714/2009), the Directive on electricity (2009/72/EC) and the Regulation establishing an Agency for the Cooperation of Energy Regulators (ACER) (R. 713/2009). The first has been approved as directive 2018/2001, of December 11 (DFER), and is planned to come into effect on 1 January 2021, and latest by 30 June 2021, by when the national provisions needed to enforce the Directive must be enacted and enforced. The second directive will come into effect 20 days from the publication date in the Official Journal of the European Union, and Member States will have 12 months from its coming into effect, to enforce most of what is established in the directives.

The aim of both texts is to promote active citizen participation in the energy sector. The PDMIE defines standards in consumer education and protection, and on their open access to the integrated market (art. 1);

[8] Despite the progress made, this Directive has been described as not very ambitious and lacking in incentives to compensate for negative externalities that do not generate renewable energies (CASTRO-GIL, J. "Alcance de la Directiva, predictibilidad y competitividad del sector renovable europeo" en FER. *Directiva Europea sobre Energías Renovables. Desafío y oportunidades*, Madrid, 14 de diciembre de 2016, pp. 14)

whilst the DFER establishes rules on financial help for electricity obtained from renewable sources and self-consumption of renewable electricity (art. 1).

Citizen participation in the renewable energy market can cover several activities (production, consumption, storage and sale) and may be undertaken directly or via legal entities such as cooperatives. European regulations have coined two new concepts to differentiate these two ways of participating: "self-consumer of renewable energy" and "communities of energy from renewable sources".

4.2. The self-consumer of energy from renewable sources.

The self-consumer of energy from renewable sources was defined in PDFER as an active consumer, or group of consumers, who act jointly, who consume and may store and sell renewable electricity generated at their own facilities, including multi-apartment blocks, residential areas, commercial, industrial or shared services sites, on the same closed distribution networks, provided that, in the case of self-consumers of renewables that are not homes, and that, the said activities do not constitute their main commercial or professional activity (art. 2.2aa PDFER). However, the text that was finally approved reduces the possibilities of shared self-consumption because self-consumers have to meet "*in the same building or multi-apartment block*".

The self-consumer is also identified as a "prosumer", an acronym formed from the original blend of the English words producer and consumer. In both cases the term highlights the dual condition of producer and consumer but, said concepts as defined in the regulations we are commenting on, contemplate other typical activities of the self-consumer such as storage of the energy produced and sale of unused energy.

The PDMIE considers that, despite the fact that a growing number of consumers use roof solar panels and batteries to store energy, self-generation is still hindered by the absence of common rules for "prosumers". In its opinion these barriers would be removed if we could guarantee the right of consumers to generate power for their own use and sell the excess to the grid, calculating costs and benefits for the system as a whole.

To guarantee the right to self-consumption of energy is an aim in both proposals.

Thus, the PDMIE in article 15 requires Member States to guarantee that final customers have the right to generate, store, consume and sell self-generated electricity on all organized markets whether individually or via aggregators (jointly), without being subject to disproportionately onerous procedures or charges that do not reflect the costs; and are subject to access tariffs to the grid that reflect transparent and non-discriminatory costs, accounting separately for the electricity supplied to the grid and the electricity consumed from the grid.

For its part the DFER in article 21 also establishes several obligations of Member States in favour of self-consumption of renewables.

Firstly, that they guarantee the right of all consumers to become self-consumers of renewables.

Secondly, they must guarantee that self-consumers of renewables, whether they act individually or jointly, are entitled to "generate renewable energy, including for their own consumption, store and sell their

excess production of renewable electricity; to maintain their rights and obligations as final consumers, and to receive remuneration for the self-generated renewable electricity that they feed into the grid".

Third, self-consumers will not be subject, "*in relation to the electricity that they consume from or feed into the grid, to discriminatory or disproportionate procedures and charges, and to network charges that are not cost-reflective*", while in relation to their self-generated electricity from renewable sources remaining within their premises, they will not be subject "*to discriminatory or disproportionate procedures, and to any charges or fees*". However, Member States may apply non-discriminatory and proportionate charges and fees for this last energy, in several cases: "*a) if the self-generated renewable electricity is effectively supported via support schemes; b) from 1 December 2026, if the overall share of self-consumption installations exceeds 8 % of the total installed electricity capacity of a Member State, and if it results in a significant disproportionate burden on the long-term financial sustainability of the electric system, or creates an incentive exceeding what is objectively needed to achieve cost-effective deployment of renewable energy, and that such burden or incentive cannot be minimized by taking other reasonable actions; and c) if the self-generated renewable electricity is produced in installations with a total installed electrical capacity of more than 30 kW*".

As we see, the right to self-consumption is recognized, but conditioned to be compatible with the sustainability of the electrical system.

Fourthly, Member States shall ensure that renewables self-consumers located in the same building, including multi-apartment blocks, are entitled to engage jointly in the generation, consumption, storage and sale of the generated energy, "*and that they are permitted to arrange sharing of renewable energy that is produced on their site or sites between themselves*".

Fifthly, the renewables self-consumer's installation "*may be owned by a third party or managed by a third party for installation, operation, including metering and maintenance, provided that the third party remains subject to the renewables self-consumer's instructions. The third party itself shall not be considered to be a renewables self-consumer*".

Finally, Member States must assess the existing barriers and the potential development of self-consumption in their countries in order to establish a framework which enables the fostering and facilitating of the development of renewable self-consumption. This favourable framework "*shall address accessibility of renewables self-consumption to all final customers, including those in low-income or vulnerable households; unjustified barriers to the financing of projects in the market and measures to facilitate access to finance, or incentives to building owners to create opportunities for renewable self-consumption, including for tenants*". This favourable framework must be part of the national integration plans on climate and energy, and shall include certain measures set out in the Directive.

4.3. Renewable energy community (REC). Characteristics.

We have seen how consumers can act directly in the renewables marketplace, producing, consuming, storing and selling the energy produced. In these cases, they are called "self-consumers". A self-consumer may act individually or jointly because several persons may jointly produce, consume, store and sell as a group renewable energy generated at their own facilities, while still being self-consumers.

But European regulations also contemplate that a group of people constitute a renewable energy community. A renewable energy community was defined in the PDFER as "a local energy community", that is, an association, cooperative, company, not-for-profit organization or other legal entity that is in effect controlled by shareholders or local members, generally aimed at values more than profitability, and are devoted to distributed generation, conduct of activities typical of a distribution network manager, supplier or local aggregator, even at cross-border level (art. 2 PDMIE). However, the text that was finally approved dispenses with the expression "*local community*" and does not list possible legal forms.

The energy community is defined as an autonomous legal entity which, in accordance with the applicable national law, is based on open and voluntary participation and is effectively controlled by shareholders or members that are located in the proximity of the renewable energy projects. These projects must be owned by the legal entity and be developed by it.

The members of the energy community can be natural persons, local authorities, including municipalities and SMEs, provided that, in the case of private companies, "their *participation* does not constitute their main commercial or professional activity".

Finally, the primary purpose of an energy community is "*to provide environmental, economic or social community benefits for its shareholders or members or for the local areas where it operates, rather than financial profits*".

Although cooperatives are not expressly stated, it is the legal form that can best meet the characteristics attributed to the energy community: voluntary and open accession, service to its members and the community, economic and social purposes, or democratic control (Cusa, 2018).

4.3.1. The recognition of renewable energy communities.

The DFER orders Member States to guarantee that final customers, in particular household customers, "*are entitled to participate in a renewable energy community while maintaining their rights or obligations as final customers*", and without being subject to unjustified or discriminatory conditions or procedures that would prevent their participation in a renewable energy community (art. 22.1).
In addition, Member States must guarantee that renewable energy communities are entitled to produce, consume, store and sell renewable energy; access all suitable energy markets both directly or through aggregation in a non-discriminatory manner, and share, within the renewable energy community, renewable energy that is produced by the production units owned by that renewable energy community.

Therefore, Member States cannot prohibit consumers from sharing energy or demand unjustified rates or guarantees, the amount of which discriminates against them, as is the case in Portugal and until recently also in Spain (Meira, 2018 and Fajardo, 2018).

4.3.2. The promotion of energy communities.

The DFER requires the Member States to carry out an assessment of the existing barriers and potential of development of renewable energy communities in their territory, which provide an enabling framework to

promote and facilitate the development of renewable energy communities. The main elements of this framework should form part of the updates of the Member States' integrated national energy and climate plans and progress reports pursuant to Regulation (EU) 2018/1999[9].

The Directive identifies some measures that should be included in this facilitative framework that are aimed at eliminating unjustified obstacles, guaranteeing a non-discriminatory treatment of energy communities; provide consumers with information and participation in communities, as well as access to financing. States with their promotion or restriction policies can achieve both the deployment of energy communities and their contraction, as experience shows (Hanisch, 2017).
Finally, the Directive provides that, when designing support schemes, Member States take into account specificities of renewable energy communities in order to allow them to compete for support on an equal footing with other market participants (art. 22.7).

If, moreover, we are faced with a local "electricity" community, the PDMIE will have to be considered, which establishes in article 16 certain obligations on States, such as guaranteeing that local energy communities:

a) have the right to own, create or hire community networks and to manage them independently;

b) may access all organized markets directly or via aggregators of suppliers in a non-discriminatory fashion;

c) benefit from non-discriminatory treatment in respect of their activities, rights and obligations as final customers, generators, managers of distribution networks or aggregators;

d) are subject to fair, proportionate and transparent procedures and to charges that reflect costs.
For its part, art. 16.2 PDMIE orders Member States to draw up a favourable regulatory framework which guarantees, among other things, that participation in a local energy community is voluntary; that shareholders or members of a local energy community do not lose their rights as domestic customers or active customers, being applicable in such cases, the rule governing the right to change supplier.

[9] This facilitating framework must guarantee, among others, that: "*a) unjustified regulatory and administrative barriers to renewable energy communities are removed; b) renewable energy communities that supply energy or provide aggregation or other commercial energy services are subject to the provisions relevant for such activities; c) the relevant distribution system operator cooperates with renewable energy communities to facilitate energy transfers within renewable energy communities; d) renewable energy communities are subject to fair, proportionate and transparent procedures, (…) and cost-reflective network charges, as well as relevant charges, levies and taxes, ensuring that they contribute, in an adequate, fair and balanced way, to the overall cost sharing of the system in line with a transparent cost-benefit analysis of distributed energy sources developed by the national competent authorities; e) renewable energy communities are not subject to discriminatory treatment with regard to their activities, rights and obligations as final customers, producers, suppliers, distribution system operators, or as other market participants; f) the participation in the renewable energy communities is accessible to all consumers, including those in low-income or vulnerable households; g) tools to facilitate access to finance and information are available; h) regulatory and capacity-building support is provided to public authorities in enabling and setting up renewable energy communities, and in helping authorities to participate directly, and i) rules to secure the equal and non-discriminatory treatment of consumers that participate in the renewable energy community are in place*" (art. 22.4).

5. New perspectives for energy cooperativism in self-consumption in European Union countries.

As we have seen, European institutions are committing off late to the development of renewables and for active consumer participation in said sector, directly or as part of local communities which could be cooperatives.

To date, the promotion of renewables and self-consumption has depended on national policies, which generate/create major differences between States, as seen earlier. Some countries have promoted renewables more than others and among these, some have favoured decentralized production and other centralized production.

The promotion or not of one system of production or another does not arise solely from the existence of grants, but also from the information which is given to producers and consumers, from the facility to install, and from the financial conditions or taxes and fiscal levies and of other kinds that are applied. Normally these have been administrative barriers and lack of legal security in the face of sudden changes in support systems which have contributed most to discourage investment by savers in these new renewable energy generation systems.

Recognition by European institutions of the right to self-consumption in the proposed directives will oblige Member States to implement a legal framework that foresees the right of citizens to generate, consume, store and sell their own power, individually or in groups, including setting up energy communities.

In this new context where cooperatives take on greater prominence, and in particular for the generation and consumption of photovoltaic energy. This the most common technology for self-generation in the European Union. In 2013 almost a quarter of the additional solar capacity in Europe was installed in the residential sector: in single dwelling houses or housing comprising several storeys. Self-consumption has contributed significantly to the development of photovoltaic solar energy in countries like Germany, Denmark, Holland, Belgium and Italy.

A study drafted by the Critical Energy Observatory in October 2016 entitled "Self-consumption that democratizes the electricity system. Lessons learnt from international experience", analysed self-consumption in Germany, California (USA) and Cyprus, and highlighted that one of the main factors that has enabled the success of energy transition in Germany has been citizen participation. Of all the installed renewable power in Germany in 2012, 47% was in the hands of citizens and cooperatives, which enabled the evolution from a markedly oligopolistic system to a more democratic one. It also shows that one of the aspects that has favoured participation by citizens, farmers and consumer cooperatives is the existence of a simple and stable retribution system for the generated energy[10].

The European Economic and Social Committee, in an Opinion on "Prosumer Energy and Prosumer Power Cooperatives: opportunities and challenges in the EU countries" (2017/C034/07), highlighted the

[10]http://www.observatoriocriticodelaenergia.org/files_download/Un-autoconsumo-que-democratice-el-sistema-electrico.pdf

economic benefits of prosumer energy (the reduction in energy transmission costs, better use of local energy sources or professional activation of the local community), and proposed that one of the possibilities for intensifying the development of prosumers is the creation of prosumer partnerships, which take on the form of energy cooperatives or other legal entities. In this way, by working as a partnership, prosumers obtain better prices, are more efficient and participate directly in the improvement of local energy security. This Opinion analyses the characteristics of energy cooperatives, taking as a reference point those existing in Germany. It thus points out that the aim of cooperatives is not to maximize benefits but mainly, to provide economic aid and support to its members. Regarding funding, the examples analysed show that one in every four energy cooperatives was funded exclusively by contributions from their members, while others combined member funding and funding from credit cooperatives. Another prominent feature of these cooperatives is the presence of town councils as partners, and not only to ensure that municipal roofs and buildings are available for the installation of solar panels, but because often mayors are the ones who take the initiative to create energy cooperatives and try to convince the local population on the matter[11]. One of the reasons that lies behind setting up energy cooperatives is the opportunity to obtain energy at a lower price[12].

A study conducted in 2013 by the Cooperatives Unit of the International Labour Office (ILO) analysed the different types of energy cooperatives in view of whether they are production cooperatives, distribution cooperatives, energy purchasing or service provider cooperatives, and in view of the type of cooperative model (e.g. energy consumer cooperatives); energy source (e.g. solar cooperatives); activities and position in the value chain (e.g. purchasing cooperatives), and by actors or owners and services provided (e.g. rural electric cooperatives). Later on, it analysed a series of cases of electrification and production cooperatives in different countries of the world, as well as measured (direct and indirect) for promoting energy cooperatives by the State, the cooperative movement and international organizations. It highlighted that one of the reasons why these entrepreneurial initiatives for energy self-consumption opted for the cooperative model was because democratization of energy was being increasingly in demand, and cooperatives favoured the empowerment of people and their participation in management on equal terms; as well as, that there was an increasing public interest in finding community-based energy solutions under local ownership which had given rise to new energy regulations and support measures drawn up for renewable energy and an awareness of environmental issues and climate change.

The study concludes with several recommendations, but mainly demands a suitable legal framework for the development of these cooperative initiatives which include support measures, both technical and financial[13].

Neither can we forget the potential that cooperative associations and inter-cooperation has for the development of new cooperative experiences and learning by spreading best practices. In this respect it is worth quoting the existence of REScoop, the European Federation of Renewable Energy Cooperatives,

[11] Indeed, in many cases municipalities have been pioneers in acting and adopt policies to support renewable (ROMEA, J. "El papel del ciudadano en la Directiva como motor del cambio del modelo energético" en *Directiva Europea sobre Energías Renovables. Desafío y oportunidades*, Madrid, 14 de diciembre de 2016, p. 20)

[12] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016IE1190&from=ET

[13] http://www.uwcc.wisc.edu/pdf/providing%20clean%20energy%20through%20cooperatives.pdf

which brings together both individual cooperatives and federations of cooperatives, and which offers help to promote cooperatives of this kind (https://www.rescoop.eu/starters).

These new perspectives are contributing to Member States recognizing and promoting energy self-consumption and energy communities. A clear example has been Greece, which on 22 January 2018 passed Act No. 4513 on Energy Communities. These should be set up as cooperatives and whose exclusive aim is: to promote a social and solidarity-based economy and innovation in the energy sector; advance the struggle against energy poverty and promote sustainable energy; production, storage, self-consumption, energy distribution and supply; to increase energy self-sufficiency and safety in the municipalities of the islands; as well as the improvement of energy efficiency in final use in local and regional spheres (art.1). As Ifigenia Douvitsa summarizes (2018), the new law aspires to achieve the following goals: to enable the country's transition to green energy; to promote citizens, municipalities and local businesses to participate in the energy transition and energy planning through their direct active involvement; to address energy poverty, and to facilitate the island regions' energy autonomy.

Despite the uncertainty arising from the compatibility of the Greek energy community, as outlined in this act, with cooperative principles (Frantzeskaki, 2018) what is certain is that this law makes energy democracy possible and enables the local interested parties, as well as citizens, municipalities and local small and medium-sized companies to take an active part in the energy transition through energy projects, mainly from renewable energy sources.

The energy community allows projects to be developed which are not available for individual or group self-consumers, for instance, to possess power generators which are not found at the actual point of consumption but in the vicinity, or to share energy although not in the same building. But the energy community may, as in Greece, perform many other social activities typical of cooperatives, such as: *providing education and raising awareness on topics related to energy sustainability; supporting vulnerable groups of the population, and addressing energy poverty. Ultimately, the energy community, with its local and integrating focus on all the interested parties (citizens, municipalities, small and medium-sized businesses) is a valuable instrument for territorial development. A good example of an energy community in Greece is the Sifnos Energy and Development Cooperative, Coop. Ltd.* This community values in particular the legal form of cooperative (civil or urban) that they adopt, because this prevents them from being purchased as a capital company and because unlike social cooperatives they can, under certain conditions, distribute profits (http://sifnosislandcoop.gr/en/#legal).

6. Energy cooperativism in Spain.

"Cooperativism in the electricity sector has found presence in Spain since the beginning of the 20th century when it enabled energy to reach many homes and businesses. Many of these cooperatives have survived and have kept with the times. These cooperatives produce, distribute and sell 100% renewable energy to their members and have contributed effectively over these years to the welfare of their members and towards the development of the environment where they are located.

Along with these cooperatives, several new cooperatives engaged in the sale of renewable energy for their members, as well as those in its production were established by 2010.

Energy cooperatives offer several services to their members beyond energy supply from renewable sources, such as training and joint purchasing. Other cooperatives have also developed around the energy sector in the last few years, such as (mainly) associated work cooperatives that are engaged in advisory services, management and/or energy education.

Despite this progress, the regulations programmed by European institutions on energy matters seem to offer cooperativism with fresh opportunities for the development of activities that were until recently forbidden in Spain such as shared self-consumption; or were not recognized, such as energy communities".

In Spain, the rules governing the conditions for the production and self-consumption of renewable energies have not been as stable as they should have been so far in generating confidence in investors, nor have they promoted individual or collective self-consumption of renewable energies. Furthermore, self-consumption was recognized in 2013 (Act 9/2013 on the Electricity Sector) and was not developed until 2015 (Royal Decree 900/2015). But these regulations are not favourable, because they levy tax both on self-consumption (the "sun tax") and on energy storage; they oblige surplus energy to be supplied to the grid and expressly forbid shared self-consumption. This situation has started to change with the new government in Spain. Thus, in October 2018 (Royal Legislative Decree 15/2018) many obstacles to self-consumption were suppressed, especially to self-consumption that does not supply power to the electricity grid; it contemplates a net balance for installations with less than 100kW, and it expressly recognizes shared self-consumption. However, complete application of this law depends on the development of the rules to be drawn up. A proposed regulation was published for public consultation from 29 January 2019 to 8 February 2019, but on 15 February the dissolution of parliament was announced, and general elections were called. Hence, we will have to wait to know what the future of self-consumption of renewable energy in Spain.

Moreover, it must be pointed out that although the latest regulation passed in Spain favours self-consumption and even shared self-consumption, there is no mention of energy communities. Energy communities as defined in the Renewable Energies Directive (RED) offer possibilities which today a cooperative in Spain cannot undertake. Thus, it would be advisable that as in Greece, Spain too were to recognize and promote these organizations. However, as already stated, the political situation in Spain at the moment has created uncertainty about whether the renewable energy sector will continue to advance in its decentralization.

REFERENCES

CUSA, E. (2018) "Renewable energy communities and Energy cooperatives: organizational innovations to combine democracy and sustainable development? Paper. *2st International Forum Co-operative Law*, 27 September 2018, Athens.

DOUVITSA, I. (2018) "The new law on energy cooperatives in Greece" Paper. *ICA 2018 European Research Conference on "Cooperatives in a Rapidly Changing World: Innovation in Enterprise and Community*", 4-6 July 2018, Wageningen, The Netherlands.

FER. Fundación Energías Renovables (2016), "Conclusiones de la Jornada". *Directiva Europea sobre Energías Renovables. Desafío y oportunidades*, Madrid, 14 de diciembre de 2016, pp. 5-7.

Available in: https://fundacionrenovables.org/wp-content/uploads/2017/03/Conclusiones-Jornada-Directiva-de-Renovables-2.pdf

FAJARDO, G. (2018) "A legal framework for the promotion of energy cooperativism", Paper. *ICA 2018 European Research Conference on "Cooperatives in a Rapidly Changing World: Innovation in Enterprise and Community*", 4-6 July 2018, Wageningen, The Netherlands.

FRANTZESKAKI, M. (2018) "La creación del marco legal de las comunidades energéticas en Grecia y su compatibilidad con los principios cooperativos". Comunicación. *XVII Congreso Internacional de Investigadores en Economía Social, CIRIEC-España "La Economía Social: transformaciones recientes, tendencias y retos de futuro*", 4 y 5 de octubre de 2018 Toledo.

GREENPEACE-España. (2017) *Energía Colaborativa. El poder de la ciudadanía de crear, compartir y gestionar renovables*. September 2017. Available in: https://archivo-es.greenpeace.org/espana/Global/espana/2017/documentos/cambioclimatico/ENERGIA%20colaborativa.pdf

HANISCH, M. (2017) "Co-operatives and the transformation of the german energy sector" *The Oxford Handbook of Mutual, Co-operative, and Co-owned Business* ed: Jonathan Michie, Joseph R. Blasi, and Carlo Borzaga.

HUYBRECHTS, B. (2017) *Énergies renouvelables : les coopératives citoyennes gagnent du terrain*. Available in: http://theconversation.com/energies-renouvelables-les-cooperatives-citoyennes-gagnent-du-terrain-88725

MEIRA, D. (2018) "Legal obstacles to the creation of renewable energy communities under cooperative form in Portugal: Coopérnico as a case study". Paper. *ICA 2018 European Research Conference on "Cooperatives in a Rapidly Changing World: Innovation in Enterprise and Community*", 4-6 July 2018, Wageningen, The Netherlands.

PRIETO, P. (2017) "En la encrucijada entre las energías fósiles y las energías renovables", *La energía. Retos y problemas*. Economistas sin Fronteras, nº 24, Invierno, 2017, pp. 10-14.

ROMEA, J. (2016), "El papel del ciudadano en la Directiva como motor del cambio del modelo energético" en *Directiva Europea sobre Energías Renovables. Desafío y oportunidades*.

SAGEBIEL J, MÜLLER JR, ROMMEL J. (2014), "Are consumers willing to pay more for electricity from cooperatives? Results from an online Choice Experiment in Germany". *Energy Research and Social Science* nº. 2, pp. 90-101.

SAHOVIC, N.; PEREIRA DA SILVA, P. (2016), "Community Renewable Energy - Research Perspectives" *Energy Procedia* nº. 106 pp. 46 – 58

SOLORIO, I. (2014), *La política europea de renovables y su influencia en España y Reino Unido*. Fundación Alternativas. Estudios de Progreso, nº 80. Available in : http://www.fundacionalternativas.org/public/storage/estudios_documentos_archivos/45884f8f9754234927fb806fb711f09a.pdf

VIARDOT, E. (2013) "The role of cooperatives in overcoming the barriers to adoption of renewable energy". *Energy Policy,* nº. 63 pp. 756-764.

WIRTH, S. (2014) "Communities matter: Institutional preconditions for community renewable energy. *Energy Policy* nº. 70, July 2014, pp. 236-246.

YILDIZ Ö, ROMMEL J, DEBOR S, HOLSTENKAMP L, MEY F, MÜLLER JR, et al. (2015), "Renewable energy cooperatives as gatekeepers or facilitators? Recent developments in Germany and a multidisciplinary research agenda". *Energy Research & Social Science*, nº. 6, pp. 59-73.

YILDIZ Ö. (2014), "Financing renewable energy infrastructures via financial citizen participation - The case of Germany". *Renewable Energy*, nº. 68, pp. 677-685.

ZAMORA SANTA BRIGIDA, I. (2018) "Ordenación jurídica de la transición energética en la Unión Europea a la luz del cuarto paquete legislativo" *Revista CEFLEGAL*, CEF, nº 211-212, pp. 555-84.

Court Cases

WORKER COOPERATIVES AND THEIR DEVELOPMENT IN THE COLOMBIAN CONSTITUTIONAL COURT'S JURISPRUDENCE

Antonio José Sarmiento Reyes[1]

Pontificia Universidad Javeriana – Bogotá, D.C.

Colombia

1. Introduction: the autonomy of cooperative law in Latin America

In Latin America, the existence of cooperative law has been recognized as a special branch of law[2], a topic that is still a subject of discussion among jurists and is also strange for public authorities, both judicial and administrative, who prefer to apply civil law, commercial law or labor law, rather than cooperative law, more than anything else, due to ignorance on the matter.

Those who defend the autonomy of cooperative law base it on its legislative, scientific and didactic autonomy. In the case of Colombia, cooperative law has legislative autonomy to a large extent, since there are special norms for cooperatives, such as the Law 79 of 1988, which is the General Law of Cooperatives; and the Decree 4588 of 2006, which regulates worker cooperatives. However, the gaps must be filled, in many cases, with the norms extracted from the Commercial Code, the Civil Code or the Labor Code.

The scientific autonomy of cooperative law is based on the existence of the universal principles of cooperativism, which are applicable to all cooperatives and at the same time differentiate them from other types of companies such as commercial enterprises. Likewise, there are special institutions of cooperative law such as the cooperative enterprise, a legal entity different from the commercial enterprise; the cooperative act that has the purpose of satisfying the needs and aspirations of the cooperative members, which is different from the act of commerce whose purpose is to generate profits; and other concepts that have developed in Europe or Latin America.

Finally, the didactic autonomy is the least developed. However, in some Latin American universities cooperative law is taught independently from civil, commercial and labor law; although, at this point of time, it is still emerging due to the lack of lawyers and professors specialized in the subject.

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[1] Lawyer from the Universidad de Los Andes, Bogotá. D.C., Colombia. Masters in Law (LL.M.) Marburg, Germany R.F. Magna cum laude. Professor of Cooperative and Solidarity Law in the Pontificia Universidad Javeriana – Bogotá, D.C., Colombia. Member of the Legal Committee of the Colombian Confederation of Cooperatives -CONFECOOP. External legal advisor of the National Association of Employee Funds - ANALFE. Colombia. email: antoniojsarmiento@gmail.com

[2] COOPERATIVE LAW. III Continental Congress of Cooperative Law. Rosario, Argentina, julio de 1986, Intercoop 1987, p. 288.

Law for Cooperatives in Latin America ICA, Art. 6. https://www.aciamericas.coop/IMG/pdf/LeyMarcoAL.pdf

However, for the development of a special branch of law, not only is legislative, scientific and didactic autonomy required; but also, all the other formal sources of law are needed to contribute to that objective. Traditionally and in particular in Latin America, law, custom, jurisprudence and doctrine continue to be recognized as formal sources of law.

In this context, the rulings of the constitutional courts of each country take on a special importance. Unfortunately, due to the amount of cases that are subject to the judicial decisions of the constitutional courts, there are very few rulings that feed jurisprudence on cooperative law.

Hence the importance of the rulings issued by the Colombian Constitutional Court regarding worker cooperatives; not only for Colombian cooperative law, but also for Latin American and perhaps also for international cooperative law.

2. Worker cooperatives and cooperatives of users or consumers of services.

In Colombia, Law 79 of 1988 covers two areas: service cooperatives and worker cooperatives. Service cooperatives can be user or consumer cooperatives in which the principle of identity consists in a member being simultaneously owner, manager and user or consumer of the goods and services produced or provided by the cooperative to which he or she belongs. On the other hand, in worker cooperatives, that principle of identity consists in the member being simultaneously owner, manager and worker of his or her cooperative. In summary, instead of having two parties in a work contract: employer and employee, the associated workers are owners of the cooperative enterprise in which they work.

In this context, initially Decree 460 of 1980 was issued, to be later derogated and replaced by Decree 4588 of 2006, due to the abuses committed by certain companies that used worker cooperatives to override the rights of workers to a minimum wage and dignified working conditions, arguing that since they were not dependent workers they were not protected by the norms of the Labor Code.

Several employers began to terminate the contracts of their dependent workers, to later force them to form pseudo worker cooperatives, in order to contract directly with those cooperatives and pay them a global value, lower than the labor costs they previously paid for having dependent workers.

Hence, trade union organizations and several cooperatives raised their voices in protest against those abuses and a division arose between those who considered that the pseudo worker cooperatives should be declared unconstitutional and those who defended them, requesting the government to protect the workers from the mentioned abuses.

3. Ruling C-211 of 2000 from the Constitutional Court of the Republic of Colombia.

In a publication for the Pontificia Javeriana University[3], among other writings, Professor Belisario Guarín Torres provides clarity to the subject, stating that it is necessary to distinguish between three kinds of work relations:

a) Independent work.

b) Dependent work.

c) Associated work.

a) Dependent work. In his article, Professor Guarin argues that, there are two parties involved in contracts of dependent work: employers and employees. Additionally, in the dependent work relationship, a subordination element exists which is a unique feature that identifies this type of work. That is because the employer gives continuous orders to their employees, similarly, employees are subject to work schedules and other conditions imposed by the employer. The remuneration in these contracts is called salary. According to the Colombian legislation, in order to guarantee vital minimums for the workers, these contracts are subject to the Labor Code.

b) Independent work. In this type of work relationship, the workers are not subordinates of the contractor. The worker provides services autonomously to whoever hires it. The payment is not called salary, instead, it is agreed through a civil contract between the signing parties and it is called honoraria. For these reasons, these employment relationships are not subject to labor law. In Colombia, these employment relationships are regulated by either civil law or commercial law.

c) Associated work. Associated workers are not independent or dependent, but voluntarily submit themselves to the statutory and regulatory norms that are autonomously dictated by their cooperative. That is, they are subject to rules that are self-accepted by the group, issued by the associated workers themselves through the General Assembly of the Cooperative. In other words, the subordination element does not exist since there is no employer imposing the rules. Similarly, since all the workers are associated, neither is there independent work, instead, there is collective work.

The payment for this type of work is known in Colombia as compensation, because it is neither salary nor honoraria. Compensation is taken from the cooperative's surplus and then assigned to the member workers according to the regulations they have approved, taking into account the type of work performed, the performance and the amount of work contributed[4].

This position was accepted by the Colombian Constitutional Court in the ruling C - 211 of 2000, in which the constitutionality of worker cooperatives had been questioned because it was considered that they violated the rights of the workers by not granting them the protections of labor law. On that occasion, the constitutionality of a different form of employment relationship was acknowledged. Associated work is different from independent and dependent work relationships, hence, they are not subject to labor law.

[3] Sarmiento Reyes, Antonio José y Guarín Torres, Belisario. Legal Aspects of Cooperative Management. Pontificia Universidad Javeriana, 3 edition, 2003, Bogotá, Colombia, p. 252 et seq.

[4] Decree 4588 of 2006, article 25.

Nevertheless, the Constitutional Court stated in that ruling that associated work is protected by the Constitution and by other norms of national legislation, based on the right of freedom of association, as well as by special norms such as social security and welfare minimums that must be respected in all types of work relationships.

This decision saved the worker cooperatives from disappearing from Colombian territory. Nonetheless, despite the positive effects of the recognition by the Colombian Constitutional Court of associated work as a legitimate form of association and business, advisors and unscrupulous entrepreneurs continued to take advantage of the fact that worker cooperatives are not subject to labor law norms to disregard the rights of the associated workers. In consequence, instead of supporting associated work as a form of democratization of property and a more equitable way of distributing the economic benefits obtained by a company, more than 12,000 associated work pseudo-cooperatives were established with the sole purpose of reducing labor costs.

This generated new lawsuits and forced a more robust jurisprudential development on the matter.

4. World declaration on worker cooperatives. ICA 2005

The World Declaration on Worker Cooperatives was approved within the framework of the General Assembly of the International Cooperative Alliance (ICA), held on September 23, 2005 in Cartagena, Colombia. This declaration accepted the basic characteristics of the worker cooperative, the rules of its internal functioning, its relations within the cooperative movement, relations with the State and with regional and intergovernmental institutions, relations with employers' organizations, and relations with workers' organizations.

The World Declaration on Worker Cooperatives was revised to conform with the definition of cooperative, its values and principles contained in the Declaration of Cooperative Identity of the ICA (Manchester, 1995), itself endorsed by the International Labor Organization -ILO through its recommendation 193 of 2002, on the promotion of cooperatives.

The World Declaration on Worker Cooperatives had as one of its sources the doctrinal developments that had been made on worker cooperatives and served as a reference for later judicial rulings that have developed jurisprudence on the subject at an international level.

5. Law 1429 of 2010 on formalization and generation of employment.

With the purpose of counteracting abuses against associated workers and, on more than one occasion, in order to discourage the creation of worker cooperatives, the Colombian government issued several regulations that provided for drastic sanctions against those who contracted with pseudo worker cooperatives. As a result of these regulations, many legal advisers recommended to the companies not to contract again with worker cooperatives due to the legal risk implied by the sanctions provided in the new norms. Consequently, the number of worker cooperatives in the country decreased abruptly from

approximately 12.000 to less than 3.000[5]. The fact that a large number of worker cooperatives were dissolved and liquidated soon after the government issued the new regulation is proof that in the majority of the cases the cooperative principle of autonomy did not apply in these cooperatives. On the contrary, most of the worker cooperatives were managed by external agents, and not the workers themselves. Therefore, it is evident that these external agents were seeking the economic benefits of not having to comply with the stricter labor law when hiring their workers directly.

Once those comparative advantages disappeared, most workers were hired as dependent or as independent workers through work or civil contracts.

Of course, it was positive that most of the worker pseudo cooperatives were dissolved; but the new regulations brought great difficulties for the real worker cooperatives.

In this context, the Congress of the Republic of Colombia approved Law 1429 of 2010: "By which the law of the formalization and generation of employment was established" which, in its Article 63, states:

> *"Article 63. RECRUITMENT OF PERSONNEL THROUGH WORKER COOPERATIVES. The personnel required in any institution, public or private, needed for the performance of its permanent mission activities may not be recruited through worker cooperatives that do labor intermediation or under any other type of relationship that affects the constitutional, legal and welfare rights consecrated in the current labor laws.*
>
> *Without prejudice to the minimum inalienable rights provided in article three of Law 1233 of 2008, Pre-cooperatives and Worker cooperatives, when in exceptional cases provided by law they have workers, shall remunerate these* ***and the associated workers for the work performed****, in accordance with the provisions of the Labor Code.*
>
> *The Ministry of Social Protection, through the Territorial Directorates, will impose fines of up to five thousand (5,000) monthly minimum wage salaries, to the public institutions and/or private companies that do not comply with the provisions described. The pre-cooperatives and cooperatives that fail to comply with the provisions of this law will be subject to dissolution and liquidation. The Public Servant who contracts with worker cooperatives that do labor intermediation for the execution of permanent missionary activities will incur a serious fault.*
>
> ***TRANSITORY PARAGRAPH.*** *This provision shall be effective as of July 1, 2013.*
>
> *The underlined and highlighted text was subject of a lawsuit before the Constitutional Court."*

[5] www.Supersolidaria.gov.co

6. Ruling C-645 of 2011[6]: Most important considerations about associated work.

6.1 Purpose of the lawsuit.

The main purpose of the lawsuit against Article 63 of Law 1429 of 2010 was to obtain a declaration of unconstitutionality in relation to the following words: "Pre-cooperatives and Worker cooperatives, when in exceptional cases provided by law they have workers, shall remunerate these and the associated workers for the work performed, in accordance with the provisions of the Labor Code..."; and, in addition, this lawsuit pursued a declaration of enforceability of such provision on the basis that the labor legislation should be applied to the relations between worker cooperatives and their associates, when the competent authority warned of a situation of fraud to ordinary labor legislation.

In summary, the plaintiff maintained that the relevant provision, by imposing on Worker cooperatives (Cooperativas de Trabajo Asociado -CTA-) and on the relations between them and their associated workers the application of the labor regime of subordinate and dependent labor, did not take into consideration the concept of cooperative, solidarity and self-managed labor, which is constitutionally protected.

6.2 Considerations of the Constitutional Court

The importance of this ruling of the Colombian Constitutional Court lies in the general considerations that are made about associated work, by which the existing jurisprudence on worker cooperatives is considerably broadened and its constitutional validity continues to be defended, without prejudice to the fact that the State may set some minimum parameters to prevent decent work from being affected.

The following is a summary of the most important analyses and arguments on which the Constitutional Court based its decision.

6.2.1 Essential elements of the contract for the constitution of a worker cooperative.

The essential elements of the contract for the constitution of a worker cooperative, according to the Constitutional Court, would be the following:

i. Plurality of persons.

ii. Contribution mainly in labor.

iii. Object of social interest and non-profit.

iv. Simultaneous quality of contributor and manager.

It is noteworthy that the Constitutional Court did not use the term used in the Colombian cooperative legislation for this contract, namely: "cooperative agreement", and therefore, since it is mentioned in the law, it is a recognized type of contract.

[6] http://www.corteconstitucional.gov.co/relatoria/2011/C-645-11.htm

Article 3 of Law 79 of 1988 calls this contract: "cooperative agreement" to distinguish it from the partnership contract, by which a commercial company is constituted; and defines it as follows:

"A cooperative agreement is a contract entered into by a certain number of persons, with the aim of creating and organizing a legal entity under private law called a cooperative, whose activities must be carried out for purposes of social interest and without a profit motive."

"Any economic, social or cultural activity may be organized on the basis of the cooperative agreement."

The partnership agreement, on the other hand, is essentially for profit.

6.2.2 Relevant characteristics of worker cooperatives.

The Constitutional Court recalled that, in the Ruling C-211 of 2000, it identified the following as the most relevant characteristics of worker cooperatives:

(i) Voluntary and free association.

(ii) Equality of cooperatives.

(iii) Absence of profit motive.

(iv) Democratic organization.

(v) Work of the associates as a fundamental base.

(vi) Development of economic and social activities.

(vii) Solidarity in compensation or retribution.

(viii) Entrepreneurial autonomy.

6.2.3 Autonomy of worker cooperatives.

In previous rulings, the Constitutional Court had pointed out that, in accordance with article 59 of the Law 79 of 1988[7], in worker cooperatives, the system of labor, welfare, social security and compensation shall be established in the statutes and the internal regulations, since such matters originate in the cooperative agreement and escape the scope of regulation of labor legislation.

This figure is based on the principle of solidarity and it has manifestations from both, the perspective of the right of association and from the right to work.

In this regard, the Constitutional Court stated that worker cooperatives are born of the free and autonomous will of a group of people who decide to unite to work together under their own rules

[7] **ARTICLE 59:** In worker cooperatives in which the capital contributors are at the same time the workers and managers of the company, the system of work, welfare, social security and compensation shall be established in the statutes and regulations by reason of the origin of the Cooperative Agreement and, consequently, shall not be subject to the labor legislation applicable to dependent workers and the differences that arise shall be subject to the arbitration procedure provided for in Title XXXIII of the Code of Civil Procedure or to ordinary labor justice. In both cases, the statutory rules must be taken into account as a source of law.

contained in their respective statutes or internal regulations and added that, as stated in Judgment C-211 of 2000, in these cooperatives their members must be subject to rules that are strictly observed by all members, and approved by themselves, with respect to the management and the administration their organization, the distribution of surpluses, aspects relating to work, compensation, and all other matters relating to the fulfillment of the objective or purpose for which they decided to voluntarily associate which, in this case, is none other than to work together and thus obtain the income necessary for the members and their families to lead a dignified life.

The Constitutional Court pointed out that the power of members of such organizations to self-regulate does not mean that the legislator cannot regulate certain matters related to them.

In particular, the Constitutional Court stated that among the restrictions that the legislator may impose on worker cooperatives are those aimed at protecting the rights of people in general and workers in particular, and that, in any case, the regulatory autonomy of these entities is limited by constitutional principles and values, especially in the face of the possible affecting of fundamental rights.

6.2.4 International Classification of Status in Employment (ICSE-ILO) and associated work.

In Ruling C 645 of 2011, which is the subject of this article, the Constitutional Court referred to the International Classification of Status in Employment (ICSE), developed under the auspices of the ILO and according to which it is possible to distinguish six groups of workers:

1. Employees.
2. Employers.
3. Own-account workers.
4. Members of producers' cooperatives.
5. Contributing family workers.
6. Workers not classifiable by status.

According to the Constitutional Court, the above classification is based on a set of criteria, which differentiates two large groups of workers: a) Employees, on the one hand; and b) Own-account workers, on the other; taking into account, among other factors, consideration of the type of relations that arise between the parties to the employment relationship and various aspects of assuming the economic risk inherent in the respective activity.

In the case of the associated workers, the Constitutional Court stressed that it is necessary to bear in mind that they not only receive benefits, but also that, given their status of owners, they also have to assume the risks, advantages and disadvantages inherent in the execution of any business activity. Thus, if there are losses, they must assume them jointly, which is not the case in dependent employment relationships.

For the Constitutional Court, the recognition of the difference in labor regimes, according to the different modalities of work, does not mean that fundamental rights should not be respected or guaranteed in worker cooperatives, since otherwise, there would be discrimination against associated workers.

As an example, the Constitutional Court pointed out that fundamental rights such as equal opportunities, fair and equitable compensation for work in proportion to the quantity and quality of work, the principle of favorability in favor of the worker in case of doubt in the application and interpretation of formal sources of law, the right to training, the necessary rest, the social security, among others, are not alien to any kind of work.

6.2.5 ILO Recommendation 193 of 2002 and worker cooperatives.

This tension between the autonomy of the worker cooperatives and the rights of workers has been raised in various scenarios, in which the question has been discussed as to whether it is possible to apply to such cooperatives the labor legislation proper to the modalities of dependent work.

In this regard, within the ILO, it has been pointed out that Recommendation 193 of 2002 refers to the obligation of States to promote all types of cooperatives, including worker cooperatives, however, it points out the need to ensure that such cooperatives are not created or used to evade labor legislation or to conceal dependent employment relationships.

In this context, the ILO distinguishes between, on the one hand, the law governing the relationship between employer and worker and, on the other, legislative provisions aimed at ensuring decent working conditions.

Thus, at the meeting of experts on co-operative legislation in 1995 in Geneva (See. Labour Law and Cooperatives. Experiences from Argentina, Costa Rica, France, Israel, Italy, Peru, Spain and Turkey, Genève: International Labour Office 1995) it was concluded that ILO standards and legislation on basic human rights, health, social security and safety in the workplace, among other matters, were applicable to members of worker cooperatives, even if they were not subject to the rules that generally regulate the relations between employer and employee.

In this manner, it is possible to conclude that:

(i) Worker cooperatives constitute a valid option in the light of the Constitution so that people can self-generate work, in the context of freedom and autonomy.

(ii) Such cooperatives are subject to labor legislation aimed at ensuring that the work is carried out in conditions of dignity, and

(iii) The State has, on the one hand, the duty to promote both the associative forms of solidarity forms of ownership for workers, as well as for the respect of the minimum rights and guarantees of associated workers, and, on the other hand, the obligation to penalize the abuse of this form to create of pseudo-cooperatives with the purpose of circumventing the more protective labor legislation.

In conclusion, the Constitutional Court said, referring again the Ruling C-211 of 2000:

- The legal nature, purposes, structure and functioning of worker cooperatives are different from those of commercial companies and, therefore, it is valid for the legislator to define a different regime for them, especially in labor matters.

- In any case, this differentiated regime cannot ignore the fact that the work carried out by the members of worker cooperatives should have the same constitutional protections of dependent workers, since the

Constitution does not protect work as an abstract concept, instead, it protects "the worker and his or her dignity".

6.2.6 Labor legislation and its application in worker cooperatives.

The Constitutional Court then proceeds to analyze whether, despite the fact that, as a general rule, worker cooperatives and relations with their associated workers are not subject to the labor legislation specific to dependent workers, there are exceptions to this rule. In other words, if there are situations in which labor legislation is applied in worker cooperatives.

To such an end, the Constitutional Court refers to the Rulings C-855 of 2009 and T-449 of 2010, in which, after reiterating that the relationship that exists between the worker cooperatives and its members, in principle, are not governed by labor legislation, however, the Constitutional Court warned that the following exceptions exist:

a. When non-associated people are casually recruited for:

i) Occasional or incidental work that falls outside the tasks that characterize the normal and regular type of activities of the cooperative.

ii) Temporary replacement of a member who, in accordance with the bylaws or the associated work regime, is unable to render his or her service in relation to a task that is indispensable for the fulfillment of the corporate purpose of the cooperative.

iii) To recruit specialized technical personnel, necessary for the fulfillment of a project or program within the principal activities of the cooperative, for which there is not a member worker within the cooperative with the technical capacities for the execution of such project, provided that the chosen person does not want to associate with the cooperative.

b. The other hypothesis that requires labor legislation to apply occurs outside the scope of the cooperative or pre-cooperative and occurs when an associated worker is sent, under its mandate, to provide services to another person or legal entity.

c. The reality contract. That is to say, when a dependent employment contract is disguised in the form of a pseudo-worker-cooperative. In this event, pointed out in several Rulings of the Constitutional Court, once it is determined that in reality there is contract of dependent employment, the labor legislation must be applied.

In summary, in all of these cases, ordinary labor legislation must be applied, which inevitably displaces the provisions of the statute or associated labor regime and other regulations of the cooperative.

6.2.7 Feasibility of regulating by law that in worker cooperatives the same minimum guarantees offered to dependent workers by the labor legislation are respected.

The Constitutional Court itself stated that the legal problem of the lawsuit was whether the provision in question, article 63 of Law 1429 of 2010, when it states that pre-cooperatives and worker cooperatives had to pay both their associated workers and their dependent workers (in the exceptional cases in which they may have them) under the provisions of the Labor Code, is contrary to the constitutional precepts that protect work in all of its forms, the guarantee of the right of association and private autonomy; and

whether the provision in question violated the principle of equality, the constitutional mandate to promote solidarity forms of ownership and opposed the postulate of good faith.

In this regard, the Constitutional Court considered that there was no doubt that, in accordance with the law, when worker cooperatives hire dependent workers, the labor relationship that arises is fully subject to the provisions of the Labor Code.

Likewise, when the conditions of the so-called reality contract are established, because dependent and subordinate work relationships are hidden under the guise of Worker Cooperatives, the provisions of the Labor Code must be applied, with the additional circumstance of the solidarity that arises between the cooperative and the contracting third party in relation to labor obligations, and without prejudice to the application of the sanctions foreseen in the law itself.

Nevertheless, the provision in question, according to the Constitutional Court, goes beyond the two previous hypotheses, insofar as the legislator opted to maintain the Worker cooperatives as an option available to people facing unemployment and informality, so it is necessary to arrive at an interpretation of the provision that is compatible with that reality.

In this regard, it considered that an interpretation that harmonizes the reference made by the provision in question to the Labor Code to determine the remuneration of associated workers with the nature of the Worker Cooperatives, leads to the conclusion that the compensation that the associated workers receive in those cooperatives for the work performed must be provided in such a way that, it respects the associative and solidarity nature of this work modality, and it is equivalent in conditions to those that have been provided for the remuneration in the Labor Code as minimum of guarantees for workers.

Consequently, in Worker cooperatives, the compensation of the associated workers for the work performed must be in line with the provisions of the Labor Code in aspects such as the minimum wage, a matter in relation to which there is express regulation in Law 1233 of 2008; the principle of equal pay for equal work (Colombian Labor Code Art. 143); the percentage of the salary that may be paid in kind (Colombian Labor Code Art. 129); overtime and nighttime charge (Colombian Labor Code Art. 168) or paid rest and vacations (Colombian Labor Code Arts. 179 et seq.)

Therefore, the Constitutional Court pointed out that, in view of the ambiguities that arise from the law, in order to achieve such harmonization, it is necessary for cooperatives, in the exercise of their autonomy, to adapt their internal system to take advantage of this new reality, and the same must happen with the state regulatory framework, in order to allow the equivalence of benefits between the two modalities of work to be carried out in accordance with the minimum guarantees established in the Labor Code.

The foregoing, in the opinion of the Constitutional Court: "does not imply substituting the legal regime of Worker cooperatives, nor that in each case, in the exercise of their autonomy, those who are part of the Worker Cooperatives establish for its members conditions of compensation in accordance with those that have been provided for as a minimum of guarantees in the Labor Code, similar to those conditions existent for the regime of dependent work carried out under the employment contracts, ". (Underline added).

The provision in question imposes a restriction on worker cooperatives, however, as has been pointed out, it has been developed within the scope of the ILO's doctrinal considerations on the protection of decent

work, which admit the autonomy of cooperatives and the possibility that they operate under a legal labor regime different from the one proper to subordinate work, as long as the conditions that define decent work are respected, an aspect whose development falls within the power of configuration of the legislator.

Such consideration, if analyzed in the light of the protection of the fundamental right to work, is not detrimental to the Constitutional order or even to the recommendations of the ILO, since what is done is to extend the minimum conditions of remuneration foreseen for dependent workers, to those people who carry out the work through worker cooperatives, starting from the objective concept of protection of work and of the dignity of the person who carries it out.

Similarly, in the opinion of the Constitutional Court, the extension of the minimum guarantees of remuneration for dependent workers to members of worker cooperatives is not intended to affect the fundamental right of association, private autonomy or the duty to promote solidarity forms of ownership, since the free will of people that are interested in the worker cooperative figure is not being affected, on the contrary what the provision seeks is precisely to prevent cooperatives from being created with the aim of reducing the economic compensation paid to laborers, generating an unjustified displacement of work linked by employment contracts.

In the same way, it should be recognised that the obligation to extend the minimum conditions of remuneration provided in the labor legislation to persons associated to the worker cooperatives does not affect the fundamental right to equality. As the Constitutional Court clarifies, the imposed obligation does not consist in extending in its entirety the parameters foreseen in the Labor Code to the associative work relationship, but it is limited exclusively to the area of compensation, or payment of the workers.

In the Constitutional Court's view, such imposition is not discriminatory, since it is an extension of minimum conditions applicable to the different types of work, respecting the differences that may exist between them. The above, derived from the conception of the right to work not only on a human right level, but starting from its essential relation with human dignity, which is why certain minimum conditions necessary for the realization of these rights must apply across the board to the different modalities of work, without stopping at simple contractual formalisms.

In the same way, the maximum Constitutional Court finds that the proposed approach fully conforms to the principle of good faith, since it does not start from the premise that all the people that create worker cooperatives, do so with the purpose of concealing dependent work relations or affecting the rights of workers, but from the reality of the country itself.

In the same sense, from a Constitutional point of view there is an overriding need for the following approach: “the provision in question requires a balance between, on the one hand, the need to maintain employment generation options available to people, even though this may imply, at least in certain initial stages, a sacrifice in working conditions, and, on the other hand, the imperative mandate to promote respect for minimum guarantees for workers and to promote conditions that allow work as a whole to develop progressively under more equitable conditions from the perspective of income distribution and the satisfaction of people's minimum living standards.”

This of course, allows the legislator in turn, in the exercise of its regulatory autonomy, to proceed to impose objective burdens whose purposes are to address the abuses to which the associative form of work

is subject, and not automatically assuming bad faith on those that use worker cooperatives, and that they simply use them to elude the more rigorous labor legislation.

6.2.8 Executory force of the provision in question.

Finally, the Constitutional Court decision declares it to be a legal obligation to remunerate associated workers, under at least the same conditions established in the Labor Code for dependent workers, in accordance with the Political Constitution of Colombia.

7. Conclusions

This jurisprudence, as may be concluded, is of considerable importance for Latin American co-operative law and, in general, for associated labor law; since, in the first place, the constitutionality of worker cooperatives is being recognized as a form of employment relationship different from dependent and independent work.

Second, self-regulation (autonomy) by the associated workers is being guaranteed by setting their own rules (statutes and regulations), rather than being subject to labor law in every respect. But, at the same time, as a third central point, it enables the legislator to establish some minimums with direct reference to the Labor Code, in order to prevent the abuse of this autonomy to the detriment of decent work.

THE *MYTILINAIOS AND KOSTAKIS V GREECE* CASE OF THE EUROPEAN COURT OF HUMAN RIGHTS: THE BEGINNING OF THE END FOR THE MANDATORY COOPERATIVES IN GREECE

Demosthenis Kassavetis[1] & Ifigeneia Douvitsa[2]

Democritus University of Thrace - Hellenic Open University

Greece

Abstract

In the ***Mytilinaios and Kostakis v Greece*** case, the European Court of Human Rights (hereafter "ECtHR") examined whether the forced membership in a particular cooperative, which was exclusively responsible to process and market its members' production, constituted an infringement with the negative freedom of association of ar. 11 of the European Convention of Human Rights (hereafter "ECHR").

The Court's case law on the negative freedom of association has been largely associated with trade-unions. In the case under study, however, the allegations of the violation of the negative freedom of association were examined with regard to cooperatives. The latter posed the question as to whether such factor was crucial for the Court's decision and what kind of impact the decision had on the cooperative law and the cooperative sector in Greece.

I. FACTS

The applicants of the case under study were two winegrowers and habitants of the island of Samos in Greece[3]. As with all winegrowers of Samos, the applicants were obliged to become members of the Samos Union of vinicultural cooperatives (hereafter "Union"), which had the exclusive right to harvest its members' grapes, produce wine from it and sell it in the market[4]. The produced wine ("Samos muscat wine") is a unique wine variety, cultivated only in the specific region of the country under limited quantities and protected by the special national and European laws[5].

Since the applicants were dissatisfied with their collaboration with the Union, they expressed multiple times their will to withdraw from it and also requested a vinification license from the public

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[1] Assistant Professor, Law School of the Democritus University of Thrace, Greece.

[2] Adjunct Lecturer, Master Program on Social Solidarity Economy, Hellenic Open University, Teaching Fellow, Law School, Democritus University of Thrace.

[3]ECtHR, *Mytilinaios and Kostakis v Greece*, judgment of 3 December 2015, appl. nos. 29389/11, § 7

[4] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 7-8

[5] ECtHR,*Mytilinaios and Kostakis v Greece*, ibid, § 8

authorities, in order to convert their production into wine and market it on their own[6]. Both requests were not answered. Since the public authorities refused to grant them such license, in November 2005 they applied to the Supreme Administrative Court for a judicial review[7]. After the dismissal of their application by the Greek Court, they filed for a petition to the ECtHR, on the grounds that there had been a violation of their negative freedom of association of ar. 11 of the ECHR[8].

II. THE APPLICABLE NATIONAL LAW

A cooperative is defined as mandatory or compulsory, when its formation and its members' participation is not a matter of free will, but, instead, it is forced by law[9]. Withdrawal from such a cooperative is also prohibited[10]. Under the Greek legal framework, mandatory cooperatives are protected by the Constitution, as well as by special laws. Specifically, ar. 12.5 of the Greek Constitution reads as follows:

"*Establishment by law of compulsory cooperatives serving purposes of common benefit or public interest or common exploitation of farming areas or other wealth producing sources shall be permitted, on condition however that the equal treatment of all participants shall be assured*[11]".

The above provision allows the common legislator to prescribe the formation of mandatory cooperatives for the above-stated reasons of public interest, as an exception to the freedom of association of ar. 12.1 of the Greek Constitution[12]. Despite, however, their mandatory status, such cooperatives have been acknowledged as legal persons of private law[13].

On the above constitutional basis, the Greek legislature passed several laws[14] on mandatory cooperatives, which can be divided into two categories: a) the ones associated with the agricultural land and forest, aiming at safeguarding the rights of property or their rational use, b) the ones focused on the protection of specialty products or products of particular regions of the country through jointly

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[6] ECtHR,*Mytilinaios and Kostakis v Greece*, ibid, § 7, 9

[7] ECtHR,*Mytilinaios and Kostakis v Greece*, ibid, § 9

[8] ECtHR,*Mytilinaios and Kostakis v Greece*, ibid, § 10

[9] Dagtogloy, P. (2005). Constitutional Law: Civil rights. 2nd Vol., p. 903

[10]Dagtogloy, ibid, p. 903

[11]For the official translation of the constitution of Greece in English, see http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf

[12] Dagtogloy, ibid., p. 903

[13] Hellenic Supreme Administrative Court, 2903/1983, The Constitution [*Το Σύνταγμα*] 1984, p.198 (in Greek). Contra Dagtogloy, ibid., p. 904.

[14] Such as the mandatory law 1627/1939 on forest cooperatives, the L. 4878/1931 on Crete Citron Producers' Association, the mandatory law 6085/1934 on the Samos Union of vinicultural cooperatives, the mandatory law 1390/1938 on the Chios's Association of Mastic Producers, the L. 359/1947 on the Union of agricultural cooperatives of Santorini's products - Santo Wines, the decree law 818/1971 of the mandatory cooperative of Kozani's saffron producers, the decree law of the 11th of July 1923 on cooperatives of jointly owned property and fodder. See Ministry of Rural Development and Food (official site), available at http://www.minagric.gr/index.php/el/ethniko-mitroo-agrotikon-synetairismon-kai-allon-syllogikon-foreon-menu/201-2011-06-07-09-27-04

organizing, processing and marketing their production[15]. One such law was L. 6085/1934, in the explanatory report of which it was mentioned that the Samos wine price volatility, the decline of its cultivation and the phenomena of wine fraud led to radical measures taken by request of all the winegrowers, in order to prevent the financial collapse of the sector and protect the quality of the Samos wine, since it was a unique product and a valuable source of income for the local, as well as the national economy[16]. Thus, the law stipulated in ar. 1 of the Greek Constitution, the establishment of local cooperatives, in which all winegrowers of Samos were obliged to participate, and in ar. 5 stated that the above cooperatives would form the Samos Union of vinicultural cooperatives with the purpose of collecting, processing and marketing the production of all its members-cooperatives. The presidential decree of the 25th of May 1934 also attributed to the Union supervisory and monitoring duties towards its members.

III. THE JUDGEMENT

With regard to the applicants' allegations that ar. 11 of the Convention was violated, the Greek government argued that such provision was not applicable in the case under question, since mandatory cooperatives were public-law associations and not private ones. Concerning the applicability of ar. 11, the Court noted that the Union did not fulfill two of the four criteria in order to be considered as a public-law association, namely, the criterion of integration within the structures of the State and the criterion of the existence of administrative, rule-making or disciplinary prerogatives. Therefore, ar. 11 rendered applicable in the case under question.

Furthermore, the Court considered that the tacit refusal by the public authorities to grant a vinification license to the applicants constituted an interference with their negative freedom of association [17]. So as for such an interference to be legitimate, it needed: a) to be prescribed by law, b) to serve a legitimate goal and c) to be necessary in a democratic society.

In the case under study the Court noted that the refusal to grant a wine making license to the applicants was based on domestic law (L. 6085/1934). It also pursued the legitimate goal of protecting the rights and freedoms of others by protecting the quality of the Samos Muscat wine and the income of the winegrowers, thereby complying with the first two criteria of ar. 11.2[18]. With regard to the third criterion on the necessity of the right's restriction in a democratic society, the Court, through its body of case law, has developed over the years several principles to be followed. In particular, according to the Court's case law, the term "necessary" did not bear the same meaning as "useful" or "suitable"[19]. Furthermore, the notion of necessity is to be assessed through the prism of pluralism, tolerance and broadmindedness, that are hallmarks of a "democratic society", in order for a balance to be achieved which ensures the fair and

[15]Vavritsa D. (2010). Financial analysis of compulsory cooperatives in Greece. [*Οικονομική διερεύνηση των αναγκαστικών συνεταιρισμών στην Ελλάδα*], Unpublished MS thesis, Aristotelian University of Thessaloniki, Greece (in Greek), p. 38.

[16] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 17, 18

[17] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 53

[18] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 55

[19] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 56

proper treatment of minorities and avoids any abuse of a dominant position[20]. Lastly, any restriction imposed on a Convention right must be proportionate to the legitimate aim pursued[21]. In this regard, the member state is acknowledged a certain margin of appreciation to assess whether there is a pressing social need that justifies a restriction to a right, which is protected by the ECHR[22]. Such discretion is not however unlimited, but it is subject to the scrutiny of the ECtHR, which shall examine whether the restriction of the Convention right is proportionate to the pursued legitimate goal and whether the member state presents before the Court convincing reasons to justify the restriction[23].

In the case under study, the Greek government argued that the Union was the only means that could effectively safeguard the Samos muscat wine's quality, and thus its abolishment would lead to prices' decline and the deterioration of the produced wine's quality, destabilizing therefore, the whole wine sector of Samos. On the other hand, the applicants claimed that the Greek government did not provide the Court with evidence that a potential abolishment of the Union would have such a negative impact on the wine producers' sector of Samos and its local economy. According to their allegations, the Union's prices were not competitive and disabled them from covering their production costs.

The Court examined the Greek governments' claims, but it was not convinced that the pressing social needs of 1934, which led to a forced cooperation of the Samos wine sector, existed in the current context. The Court based its opinion on the large number of the Samos Muscat winegrowers and the fact that most of their production had been exported, which indicated that the wine sector of Samos had been well developed, while protected by "the protected designation of origin" regulation. The Court also noted that the Greek legislature permitted in 1993 the mandatory cooperatives' conversion into voluntary cooperatives. The latter, in the Court's view, indicated that the Greek authorities no longer considered the mandatory cooperatives as a sine qua non condition for the existence and development of particular activities or sectors, which were organized under the model of mandatory cooperation.

The Court viewed also the judicial argumentation of the Supreme Administrative Court in its decision of November 2005, which held that there was no violation of ar. 11 ECHR, since the restriction to the freedom of association was only posed to the activities of producing and marketing wine, whereas winegrowing was unrestricted. The latter distinction was deemed by the ECtHR as artificial, excluding any form of autonomy or independence of the winegrowers concerned. Instead, the Court, followed the dissenting opinion of one judge of the Supreme Administrative Court, which noted that the legitimate aim i.e. the protection of the wine's quality, could have been achieved with other measures less intrusive to the negative freedom of association, such as with quality controls by the state or other competent bodies, which would preserve the winegrowers' autonomy and their right to choose whether or not to join a cooperative and to dispose and market their production, accordingly.

To sum up, the applicants were forced to become members of the Samos Union of vinicultural cooperatives. Due to their membership, they had the obligation to hand all their production to the Union, so that the latter would exclusively process and market their production. In the light of the foregoing, the

[20] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 56

[21] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 56

[22] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 56

[23] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 57

Court held that such an obligation was the most restrictive measure with regard to the applicants' negative freedom of association. Furthermore, with regard to the public authorities' refusal to grant the applicants a winemaking license based on L. 6085/1934, the Court ruled that such a measure was disproportionate to the attained goal, exceeding what was necessary for a fair balance between conflicting interests. For all these reasons, the ECHR concluded that in the case under question there had been a violation of ar. 11 of the ECHR.

IV. COMMENTS

a. The legal personality of the cooperative as a non crucial factor for the court's decision

In the case under study, the beneficiaries of the negative freedom of association were members of a mandatory cooperative. It is not frequent for the Court's case law to examine claims on the infringement of the above right with regard to cooperatives, since the main body of relevant case law refers to trade unions or other types of associations. The fact that the association under question was established as a cooperative, and in particular as a mandatory one, according to national law, did not play any crucial role to the Court's decision. The legal personality that the national legislature attributes to the association is only a starting point for the Court[24]. The key point, thus, that defined the applicability of ar. 11 in the commented case was whether or not the Union was considered as a private or public law association, based on the criteria that the Court had set out.

In general, the Court does not deliberately acknowledge associations under public law, which would result in excluding their members from the protection of the negative freedom of association of ar. 11, but, instead, it tends to maintain a strict stance[25], considering an association as a public one, only when all four of its criteria are fulfilled, cumulatively[26]. The latter was also confirmed in the case under

[24] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 36; ECtHR, Chassagnou et al. v. France, judgment of 29 April 1999, (appl. nos. 25088/94, 28331/95, 28443/95), § 100: "*[i]f Contracting States were able, at their discretion, by classifying an association as 'public' or 'para-administrative', to remove it from the scope of Article 11, that would give them such latitude that it might lead to results incompatible with the object and purpose of the Convention, which is to protect rights that are not theoretical or illusory but practical and effective* […..] *The term "association" therefore possesses an autonomous meaning; the classification in national law has only relative value and constitutes no more than a starting-point"*; ECtHR, *Herrmann v Germany case*, judgement of the 20 January 2011 (Application no. 9300/07) (§76); ECtHR, Schneider v. Luxembourg, judgement of the 10 July 2007 (appl. no. no. 2113/04) (§69). See also van Veen, W. (2000). Negative Freedom of Association: Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, The International Journal for Not-for-Profit Law, Vol. 3, Issue 1, http://www.icnl.org/research/journal/vol3iss1/art_6.htm

[25] In both *Le Compte, Van Leuven and De Meyere v. Belgium*, judgement of the 23 June 1981 (appl. no. 6878/75; 7238/75)(§64-65) and *Herrmann v Germany case*, judgement of the 20 January 2011 (appl. no. 9300/07) (§64-65) the ECtHR concluded that the associations at issue were considered of public law, as they fulfilled all four criteria, whereas in Chassagnou and others v. France, judgement of the 29 April 1999 (appl. nos. 25088/94, 28331/95 and 28443/95) (§ 101-102) the association was considered of private law, as it did not fulfill all the above criteria.

[26] See however Papandreou, M. (2016). The freedom of association according to ar. 11 of ECHR: Mandatory agricultural cooperatives and the negative freedom of association [Το δικαίωμα του συνεταιρίζεσθαι κατά το άρθρο 11 ΕΣΔΑ: Αναγκαστικοί αγροτικοί συνεταιρισμοί και αρνητική ελευθερία του συνεταιρίζεσθαι], Hellenic Review of European Law (HREL) [Ελληνική Επιθεώρηση Ευρωπαϊκου Δικαιου (ΕΕΕυρΔ)], Issue 2, p. 260. who argues that the Court in the case under study does not provide a proper explanation, when it comes to assessing the aforementioned criteria, questioning also if there is an hierarchy among them.

study, according to which the Union, not fulfilling two of the four criteria, it was viewed by the Court as a type of private-law association, to which ar. 11 was applicable[27].

b. The negative freedom of association

The negative freedom of association, which was claimed to be violated in the case under study, consists of the right to choose not to form or not to join an association, including the right to withdraw from it[28]. Interestingly, the protection of the above right on the basis of ar. 11 of the Convention[29] was not a given by the ECtHR, which was reluctant at first to acknowledge it[30], but as its case law developed over time, it changed its stance and accepted the protection of both the positive and negative aspect of the freedom of association at an equal footing[31].

In the case under study the applicants' allegations referred to a violation of their negative freedom of association. The Court examined the above claims and concluded that forcing the applicants to hand over their entire wine production was the most restrictive measure with regard to the applicants' negative freedom of association[32]. To be, however, more accurate, the obligation of all winegrowers to hand over their production to an association, in order for it to be processed and sold in the markets, seems to restrict their freedom to define the conditions to exercise their profession as winegrowers[33]. Since the above was imposed to the applicants as an obligation of their mandatory membership to the Union, it also interfered with their negative freedom of association. In the Convention, although the negative freedom of

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[27] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 45

[28] Grabenwarter, C. (2014). European Convention on Human Rights (Commentary), p.303; ECtHR, Chassagnou v France, judgement of 29 April 1999 (appl. no. 25088/94), § 103; ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 53; ECtHR, Sigurður A. Sigurjónsson v. Iceland judgment of 30 June 1993, (appl; no. 16130/90), § 37

[29] The wording of the ar. 11 of the ECHR refers to the right to form an association, but it does not explicitly prescribe for the right not to form one, as ar. 20(2) of the Universal Declaration of Human Rights does. In the Travaux Préparatoires of the ECHR it was mentioned that : "on account of the difficulties raised by the 'closed-shop system' in certain countries, the Conference in this connection considered that it was undesirable to introduce into the Convention a rule under which 'no one may be compelled to belong to an association' which features in [Article 20 par. 2 of] the United Nations Universal Declaration" (Report of 19 June 1950 of the Conference of Senior Officials, Collected Edition of the "Travaux Préparatoires", vol. IV, p. 262).

[30] ECtHR, Young, James and Webster v. the United Kingdom, judgement of the 13 August 1981 *(application no. 7601/76; 7806/77)*: "*52. The Court does not consider it necessary to answer this question on this occasion. The Court recalls, however, that the right to form and to join trade unions is a special aspect of freedom of association (see the National Union of Belgian Police judgment of 27 October 1975, Series A no. 19, p. 17, par. 38); it adds that the notion of a freedom implies some measure of freedom of choice as to its exercise. Assuming for the sake of argument that, for the reasons given in the above-cited passage from the travaux préparatoires, a general rule such as that in Article 20 par. 2 of the Universal Declaration of Human Rights was deliberately omitted from, and so cannot be regarded as itself enshrined in, the Convention, it does not follow that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11 (art. 11) and that each and every compulsion to join a particular trade union is compatible with the intention of that provision. To construe Article 11 (art. 11) as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee (see, mutatis mutandis, the judgment of 23 July 1968 on the merits of the "Belgian Linguistic" case, Series A no. 6, p. 32, par. 5, the Golder judgment of 21 February 1975, Series A no. 18, p. 19, par. 38, and the Winterwerp judgment of 24 October 1979, Series A no. 33, p. 24, par. 60)".*

[31] van Veen, W. (2000) 'Negative Freedom of Association: Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms', The International Journal for Not-for-Profit Law, Vol. 3, Issue 1, http://www.icnl.org/research/journal/vol3iss1/art_6.htm

[32] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 65

[33] Tsironas, T. (2012). Remarks on the Council of the State judgement 3580/2010 D΄ Chamber [Παρατηρήσεις στην απόφαση ΣτΕ 3580/2010 Δ΄ Τμ.], [Διοικητική Δίκη (ΔιΔικ)], Issue 24, (in Greek), p. 326.

association is protected by ar. 11, the freedom to exercise one's profession is not acknowledged by individual provisions. In the case under study, however, the latter right seemed to be indirectly protected by the Convention, through ar. 11, that safeguarded not only the applicants' right not to join the Union, but also their right to choose the conditions under which to dispose and market their wine production[34].

c. The failure of the Greek Government to pass the proportionality test - the Court's arguments

Generally, in cases related to associations of ar. 11 (except for trade unions and political parties) the Court leaves only a narrow margin of appreciation to the member states to assess whether there is a pressing social need to impose a restriction to the above right. The above assertion is not unlimited, but it is subject to the supervision of the Court that accepts only convincing and compelling reasons that justify restrictions to the freedom of association[35].

In the commented case, the Court came to the conclusion that ar. 11 ECHR was violated, because the Greek Government failed to pass "the proportionality test"[36]. In other words, it failed to provide the court with persuasive arguments proving that the interference with the negative freedom of association was justified by a pressing social need and it was proportionate to the legitimate goal of the protection of the Samos Muscat wine's quality.

In particular, the government's claim that abolishing mandatory cooperatives shall endanger and destabilize the wine sector of Samos[37] did not persuade the Court and rightfully[38], since the latter entailed a hypothesis of a 1934 revival, without however providing any evidence to prove it. The Greek Government also argued that the Union was the only appropriate measure to protect the wine's quality[39]. The above claim was not accepted by the Court, which based its opinion on various compelling arguments, such as the fact that less intrusive measures for the negative freedom of association could have been chosen, thereby following the opinion of the minority of the Supreme Administrative Court[40]. Furthermore, in the Court's view, the reasons that led to the forced cooperation of all winegrowers in 1934, was rrelevant under the current context[41]. The above argument holds true, since nowadays there is no pressing social need for the well-developed wine sector of Samos to be organized into mandatory cooperatives, to preserve its viability and prosperity. The Court also took into account the Greek legislature's position that allowed the conversion of mandatory cooperatives to voluntary ones[42]. Based

[34] The interference that the court examined as to whether it may be justified by ar. 11.2 ECHR was the tacit refusal of the public authorities to grant the applicants a vinification license. ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 53

[35] Golubovic, D. (2013) Freedom of association in the case law of the European Court of Human Rights, The International Journal of Human Rights, 17, p. 13 : "*In most cases involving violation of Article 11 the Contracting States have failed the proportionality test*" with references to ECtHR relevant cases (footnote 80). Sisilianos, L.A. (2017). European Convention of Human Rights: Interpretation per article [Ευρωπαϊκή Σύμβαση Δικαιωμάτων του Ανθρώπου: Ερμηνεία κατ΄ άρθρο] (in Greek), p. 529.

[36] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 55-66

[37] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 47

[38] Papandreou, ibid p. 260

[39] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 48

[40] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 63

[41] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 62

[42] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 64

on the above, one may argue that if mandatory cooperatives were viewed by the Greek authorities as the only appropriate measure to safeguard specialty products or products from specific regions of the country, their conversion into voluntary cooperatives would not be permitted by law, instead, it would be prohibited by all means. One other interesting point raised by the Court referred to the Supreme Administrative Court's decision, which ruled that there was no violation of ar. 11 ECHR, since the restriction to the freedom of association was only posed to the activities of producing and marketing wine, whereas winegrowing was unrestricted. The above distinction was correctly deemed by the ECtHR as artificial, since cultivating grapes in large quantities is not so much for self-consumption purposes, but mainly for commercial purposes and therefore the restriction abolishes the autonomy of the winegrower to dispose and market his production on his own[43].

Based on the above arguments, the Court held that the measure at issue was deemed disproportionate to the pursued aim and therefore there was a violation of ar. 11[44]. The above decision was found to be well grounded and followed existing case law on forced membership in associations that was also deemed to violate the negative freedom of association.

d. Mandatory cooperatives and the cooperative theory

From a (cooperative) theoretical point of view, forced cooperation of the Samos winegrowers does not seem to be in line with the first international cooperative principle of "voluntary membership", based on which the interesting parties shall choose whether or not to form or join a cooperative and if they choose to become members, they shall not be prevented from leaving the cooperative[45]. The voluntary nature of cooperatives is also enshrined in the broadly accepted international definition of cooperatives by the ICA, as incorporated in the Recommendation 193/2002 of the International Labor Organization[46]. This is due to the fact that the personality of the cooperators, the will to cooperate and the trust between them are key features of cooperation. Therefore, a forced cooperation is neither an attribution of a genuine type of cooperative, nor does it fall within the internationally accepted ICA definition.

V. IMPACT

Within a short period of time, the Greek government complied with the Court's judgment, by including in the new law on agricultural cooperatives, a provision (ar. 32 L. 4384/2016) on converting mandatory cooperatives to voluntary ones. The latter is effectuated by a join ministerial decision that is issued in the following cases: a) after a decision by the mandatory cooperative's general assembly, b)

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[43] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 61, Papandreou, ibid p. 260

[44] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 66

[45] Munkner, H. (2015). Co-operative principles and co-operative law, 2nd revised edition, p. 97. International Co-operative Alliance: Principles Committee (2015). Guidance notes to the co-operative principles, p.6 : "*Some governments that used co-operatives as government controlled engines of economic development made membership of co-operatives compulsory. this too breaches this 1st Principle*", p.7 : "*the voluntary nature of participation in co-operatives is an indispensable organisational trait that makes them viable and sustainable in competitive markets*".

[46] "A co-operative is an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise". International Co-operative Alliance Statement on the Co-operative Identity, Manchester (UK), 23 September 1995.

after a definite judgment of conviction by courts, c) in order to implement national law. Contrary to previous laws that prescribed for such conversion, the new provision introduces two cases (b and c), where such process is imposed on the mandatory cooperative without the consent of its administrative organs.

Based on the above provision, the 902/51563 joint ministerial decision was issued on the 27th of April 2016, that resulted in the conversion of the Samos Union of vinicultural cooperatives into the new, voluntary Uniform Winemaking Agricultural Cooperative of Samos with the merger of its 22 primary cooperatives-members[47].

The above developments mark the beginning of the end for the mandatory cooperatives in Greece, an institution that resulted in the formation of successful, export-oriented cooperatives in the agriculture, safeguarding, among other things, the preservation of rare agricultural varieties, prevent their extinction and develop them into significant sources of income for the local and national economy[48].

Nevertheless, the future impact of such a major change on the function of mandatory cooperatives, and on the production of the above unique products, as well as on the income of the local producers, is yet to be ascertained A study, however, examined the case of *Santo Wines*, a mandatory wine cooperative based on the island of Santorini, where it concluded that its prosperity was not mainly associated with the mandatory status of membership, but it was rather a result of its successful strategy, which – among other things- aimed at "*fostering interpersonal relationships between members and the management, promoting Santo's image, and building a strong brand for their products*"[49].

In order to prevent the Greek government's claims that were presented before the ECtHR from becoming a self-fulfilling prophesy, leading to the destabilization of the wine sector of Samos, the mandatory cooperatives' conversion into voluntary ones should go hand in hand with the implementation of effective quality controls. Otherwise, the quality of unique products, such as the Samos Muscat wine, could be endangered. The same applies for the rest of the mandatory cooperatives, the conversion of which should occur as long as proper quality control mechanisms are prescribed by law and can be effectively applied in practice.

VI. CONCLUSION

In the Mytilinaios and Kostakis v Greece case, the Court held that the winegrowers' obligation to hand all their production to their Union based on L.6085/34 was the most restrictive measure with regard to their negative freedom of association[50]. Furthermore, the refusal to grant a winemaking license to the applicants exceeded what was necessary for a fair balance between the right at stake and the rights and freedoms of the winegrowers, and it was also found as disproportionate to the attained goal[51]. For all these reasons, the Court ruled that ar. 11 of the ECHR was violated[52].

[47] Action report on the execution of the judgment of the European Court of Human Rights in the case of Mytilinaios and Kostakis v. Greece (application no. 29389/11), 27/02/2017, Committee of Ministers, p. 3.

[48] Regarding the financial success of mandatory cooperatives see Vavritsa, ibid., p. 111-119.

[49] Iliopoulos, C. Theodorakopoulou, I. (2014). *Mandatory cooperatives and the free rider problem: the case of Santo wines in Santorini, Greece*. Annals of Public and Cooperative Economics 85 (4), p. 678.

[50] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 66

[51] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 65

[52] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 67

In the above case the legal personality of the mandatory cooperative was a non-crucial factor for the Court's decision, which considered the Union as a private law association based on the criteria that it has developed in its body of case law and therefore ar. 11 ECHR was applicable[53]. Furthermore, the Greek Government failed to convince the Court that the interference with the negative freedom of association was justified by a pressing social need and it was proportionate to the legitimate goal of the protection of the Samos Muscat wine's quality and thus it concluded that ar. 11 was infringed. Although the case referred to the restriction of the negative freedom of association, it seems that the freedom to define the conditions to exercise one's profession was also implied and indirectly protected by the Convention, through the ar. 11. From the cooperative theory point of view, mandatory cooperatives are not in line with the definition of cooperatives as voluntarily formed, unions of persons and with the "voluntary membership" cooperative principle, enshrined in the ICA Statement on Cooperative Identity and incorporated in par. 2 and in the Annex of the 2002 International Labour Organization no 193 Recommendation on the Promotion of Cooperatives[54].

Concerning the impact of the decision on the Greek legal framework, it was observed that the new law on agricultural cooperatives (L. 4384/2016) was passed a few months after the Court's ruling, which prescribed the conversion of mandatory cooperatives into voluntary ones. However, contrary to previous laws, the new law was not only leaving the conversion process up to the cooperators to decide within their general assembly, but it prescribed for such a change to occur as a measure of compliance with a final court's ruling or with the national legislation. The above developments mark the beginning of the end for the mandatory cooperatives in Greece, paving the way for their overall abolishment. Although the consequences of that change cannot be foreseen, research in a particular mandatory cooperative showed that the mandatory status may not have been the most decisive factor for its success, but, instead, its marketing and community strategies that were applied by its administrative organs[55]. In any case, the mandatory cooperatives' conversion into voluntary ones should occur gradually, as long as effective quality control mechanisms are prescribed and can be applied in practice, so that the quality of production will not be put in jeopardy.

References

Action report on the execution of the judgment of the European Court of Human Rights in the case of Mytilinaios and Kostakis v. Greece (application no. 29389/11), 27/02/2017, Committee of Ministers

Dagtogloy, P. (2005). Constitutional Law: Civil rights. 2nd Vol.

Golubovic, D. (2013) Freedom of association in the case law of the European Court of Human Rights, The International Journal of Human Rights, Issue 17, pp. 758-771

Grabenwarter, C. (2014). European Convention on Human Rights (Commentary)

[53] ECtHR, *Mytilinaios and Kostakis v Greece*, ibid, § 45

[54] ECtHR, Munkner, 2015. ibid, p. 97. International Cooperative Alliance- Principles Committee, ibid p.6 :

[55] Iliopoulos, C. Theodorakopoulou, I. ibid, p. 678.

Iliopoulos, C. Theodorakopoulou, I. (2014). *Mandatory cooperatives and the free rider problem: the case of Santo wines in Santorini, Greece*. Annals of Public and Cooperative Economics 85 (4)

International Co-operative Alliance: Principles Committee (2015). Guidance notes to the co-operative principles.

Ministry of Rural Development and Food (official site), available at http://www.minagric.gr/index.php/el/ethniko-mitroo-agrotikon-synetairismon-kai-allon-syllogikon-foreon-menu/201-2011-06-07-09-27-04

Munkner, H. (2015). Co-operative principles and co-operative law, 2nd revised edition

Papandreou, M. (2016). The freedom of association according to ar. 11 of ECHR: Mandatory agricultural cooperatives and the negative freedom of association [Το δικαίωμα του συνεταιρίζεσθαι κατά το άρθρο 11 ΕΣΔΑ: Αναγκαστικοί αγροτικοί συνεταιρισμοί και αρνητική ελευθερία του συνεταιρίζεσθαι], Hellenic Review of European Law (HREL) [Ελληνική Επιθεώρηση Ευρωπαϊκου Δικαιου (ΕΕΕυρΔ)], Issue 2, pp. 257-260, (in Greek).

Report of 19 June 1950 of the Conference of Senior Officials, Collected Edition of the "Travaux Préparatoires", vol. IV

Sisilianos, L.A. (2017). European Convention of Human Rights: Interpretation per article [Ευρωπαϊκή Σύμβαση Δικαιωμάτων του Ανθρώπου: Ερμηνεία κατ΄ άρθρο] (in Greek)

Tsironas, T. (2012). Remarks on the Council of the State judgement 3580/2010 D΄ Chamber [Παρατηρήσεις στην απόφαση ΣτΕ 3580/2010 Δ΄ Τμ.], [Διοικητική Δίκη (ΔιΔικ)], Issue 24, (in Greek).

van Veen, W. (2000) 'Negative Freedom of Association: Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms', The International Journal for Not-for-Profit Law, Vol. 3, Issue 1, http://www.icnl.org/research/journal/vol3iss1/art_6.htm

Vavritsa D. (2010). Financial analysis of compulsory cooperatives in Greece. [*Οικονομική διερεύνηση των αναγκαστικών συνεταιρισμών στην Ελλάδα*], Unpublished MS thesis, Aristotelian University of Thessaloniki, Greece (in Greek)

Court Cases

Hellenic Supreme Administrative Court, 2903/1983, The Constitution [*Το Σύνταγμα*] 1984, p.198 (in Greek).

ECtHR, Chassagnou et al. v. France, judgment of 29 April 1999, (appl. nos. 25088/94, 28331/95, 28443/95)

ECtHR, *Herrmann v Germany case*, judgement of the 20 January 2011 (appl. no. 9300/07)

ECtHR, *Mytilinaios and Kostakis v Greece*, judgment of 3 December 2015, (appl. nos. 29389/11)

ECtHR, Schneider v. Luxembourg, judgement of the 10 July 2007 (appl. no. no. 2113/04)

ECtHR, Sigurður A. Sigurjónsson v. Iceland, judgment of 30 June 1993, (appl. no. 16130/90)

ECtHR, Young, James and Webster v. the United Kingdom, judgement of the 13 August 1981 (application no. 7601/76; 7806/77)

ECtHR, *Le Compte, Van Leuven and De Meyere v. Belgium*, judgement of the 23 June 1981 (appl. no. 6878/75; 7238/75)

Book Reviews

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Events

REPORT ON THE 2ND INTERNATIONAL FORUM ON COOPERATIVE LAW, ATHENS, 26-28 SEPTEMBER 2018

David Hiez[1] & Ifigeneia Douvitsa[2]

The 2nd International Forum on Cooperative Law followed the one organized in 2016 at Montevideo, Uruguay. The fruitful outcome of the Montevideo Forum – both as concerns the number of participants and the positive feed-back – led to the decision to organize such meetings biannually.

In particular, the 2nd International Forum on Cooperative Law was organized in 2018 at Athens by Ius Cooperativum, with the support of the International Co-operative Alliance and of two local co-organizers: the Hellenic Open University (Athens) and the Peoples'University on Social and Solidarity Economy (Thessaloniki).

The dialectic relation between the cooperative law and the cooperative principles was the overarching forum's theme, an indicator of the centrality of cooperative principles in forming, applying and reforming the legal environment that surrounds all cooperatives, irrespective of their country or sector of their activity.

Under the above theme, a variety of topics were addressed during the 3-day forum by the attendees coming from different countries, such as Canada, Brazil, Colombia, Uruguay, France, Spain, Portugal, Italy, Finland, Holland, Belgium, Turkey, Israel, India, Indonesia, Australia and Greece[i]. Topics included - among others - the legal relevance (if any) of the cooperative principles for other fields of law (e.g. constitutions, administration law, tax law, bankruptcy law, labor law, competition law, audit regulations, book-keeping and accounting standards), the legal requirements for specific types of cooperatives, such as agricultural, banking, energy, workers' and social cooperatives, the relation between cooperative law and the legal framework of the social economy, as well as policies and tools on research and education in the field of cooperative law.

Furthermore, two new activities were introduced that took place during the first day : a workshop for students and a round table between economists and lawyers. The first activity was the outcome of a collaboration with the European Law Students' Association and in particular with its Greek branch. More than 20 Greek undergraduate and post-graduate students joined the workshop with varied backgrounds, such as agronomy, management, law and economics who shared a curiosity in hearing more about cooperative law, most of them for the very first time. The goal of the event was to communicate what is a

[1] Professor at the University of Luxembourg, david.hiez@uni.lu

[2] Adjunct Lecturer, Master Program on Social Solidarity Economy, Hellenic Open University, Teaching Fellow, Law School, Democritus University of Thrace.

cooperative enterprise, why is it deemed different from other enterprise types and what are the national and international developments of the law that is applicable to them. Of a particular interest for the students were recent types of platform cooperatives that emerge using newest technologies.

The second activity brought together economists and lawyers in order to explore a common ground of approach to cooperatives and how can both economists and lawyers benefit from each other. The debate was guided by a list of questions on how cooperatives can be defined, how can we address their ever-growing complexity and whether they have grown from children of need to children of choice**.** The main conclusion of the debate was that in the current context, there seems to be a significantly different way of understanding cooperatives from both disciplines and further attempts are needed in the next forums in order to gradually form a common language.

A panel on the Greek legal framework took place leading to a rather heated discussion on whether the legislation should allow the formation of "women-only" cooperatives, if such provision falls in line with the first cooperative principle on voluntary and open membership and if it is still justifiable under the current context and the position of Greek women. The other point that was highlighted was the degree of the Greek cooperative legislation's fragmentation and its problematic liaison with the law on social and solidarity economy (SSE), based on which several cooperative types, such as credit unions or agricultural cooperatives cannot easily fulfill the criteria that are introduced in order to be acknowledged as a SSE actor, resulting in their exclusion from the SSE universe.

The forum ended on a high note with its attendees giving their next rendez-vous in Asia in 2020, where the 3rd International Forum on Cooperative Law shall possibly be held.

Practicioners' Corner

LEGAL FRAMEWORK ANALYSIS AND THE ICA-EU PARTNERSHIP: ACKNOWLEDGING THE SPECIFICITY OF THE COOPERATIVE MODEL AND ENSURING A LEVEL PLAYING FIELD FOR PEOPLE-CENTRED ORGANISATIONS

Arielle Romenteau, Cooperatives Europe and Jeffrey Moxom, International Co-operative Alliance, with support from the ICA Regional Offices, and external support from EURICSE (European Research Institute on Cooperative and Social Enterprises)

Abstract:

Cooperatives benefit from regulations that acknowledge their specificities and ensure a level playing field with other types of business organizations. This paper presents the research currently being conducted to examine and analyse the legal frameworks that impact cooperatives in different countries from the national to the supranational level. The research falls within the scope of the knowledgebuilding activities undertaken within the partnership for international development signed in 2016 between the European Commission and the International Co-operative Alliance (ICA), which aims to strengthen the cooperative movement and its capacity to promote international development worldwide. It demonstrates that the absence of a supportive legal framework for cooperatives, or the presence of a weak or inadequate legal framework, can negatively impact cooperatives and their evolution. In contrast, the existence of supportive regulations can foster cooperatives' creation and strengthening, acting as a driver of sustainable development. For this reason, further knowledge and evaluation of cooperative legislation will become a tool for ICA members, co-operators worldwide, and other key stakeholders such as policymakers and cooperative legal scholars. With greater knowledge and access to a global, country-based legal framework analysis, ICA members can advance their advocacy and recommendations on the creation or improvement of legal frameworks, document the implementation of cooperative legislation and policies, and monitor their evolution. This paper outlines the contextual background and knowledge gaps, key objectives and methodological features of this ongoing research, which aims to provide harmonised data on cooperative law and its provisions, both at the national and supranational level, including a critical analysis of existing provisions that impede or promote cooperatives.

Keywords: national/supranational cooperative law, international cooperative development; legislative analysis; legal frameworks; sustainable development; monitoring; evaluation

Contextual background and knowledge gaps

Background

Created in 1895, the International Co-operative Alliance (ICA) is the global representative organization of cooperative enterprises across all sectors, currently counting 313 members from 109 countries (July 2018). The ICA unites a very large part of today's cooperative development activities under its umbrella through the work of its national member federations active in development implementation and through the coordination work undertaken at the regional level by its regional offices – i.e. Cooperatives Europe, Cooperatives of the Americas, ICA Africa and ICA Asia-Pacific. The ICA has grown into an important global organization promoting the cooperative model around the world, having been recognized by the United Nations (UN) since the 1940s[1]. This current research falls within the scope of the knowledge building activities undertaken within the partnership for international development signed between the International Co-operative Alliance and the European Commission in 2016, to strengthen the cooperative movement and its capacity to promote international development worldwide, with a number of activities based on advocacy, visibility, capacity building, and research. Under this partnership, the ICA is carrying out a number of global researches, which includes the national and regional analysis of cooperative legal frameworks featured within this paper. The research aims to bring a number of added value elements and address particular knowledge gaps relevant to international cooperative law. The paper first discusses these knowledge gaps and the potential added value of the research, including a brief overview of the objectives and features of the work, before addressing the methodological instruments used. It concludes with a discussion of the key findings and the next steps, providing the reader with a detailed overview of the research forthwith.

Knowledge Gaps

Regarding knowledge gaps, in Africa, the Americas, Europe and Asia-Pacific, the lack of up to date, consistent and reliable information about cooperatives and cooperative federations is a major challenge, one which has been highlighted by cooperative members in a needs-based analysis of key concerns. Where data on the cooperative landscape is available, it is not harmonized. In many countries, cooperatives or certain types of cooperatives, are unable to develop, as the current legislations do not foresee or permit it. A regional analysis of the practical application of cooperative legislation (in the Americas, Europe, Africa and AsiaPacific) is now required to provide the necessary information for the concrete implementation of cooperative development activities, and to help foster more collaboration on the issue. In a similar way, there is a need to present this shared information in a harmonized database and format that is easily accessible to interested parties. This could bring several salient benefits to the cooperative movement, by way of the provision of clear resources for advocacy and the future monitoring and potential modification of legal frameworks. Furthermore, since ICA members will be invited to contribute to the assessment and production of recommendations regarding their respective legal frameworks, these resources will be built in an inclusive and participatory manner, thus reflecting more closely the needs of the main stakeholders concerned.

[1] For more information, see Jack Schaffer, Historical Dictionary of the Cooperative Movement, Scarecrow Press, London, 1999, pg. 393-6.

Therefore, it seems evident that the success of the cooperative business model is to a certain degree dependent on an enabling environment with benign cooperative legislation and policies. However, previous research demonstrates that in many jurisdictions the legal framework is either weak, misinterpreted, poorly implemented or entirely absent[2]. This absence has significant consequences, such as the fact that many discriminatory practices or outdated legislation remains in place today, hampering the development of existing cooperatives or preventing the creation of new cooperatives, which could drive future economic development. For example, in certain countries such as India, the companization of cooperatives is facilitated far more often than the reverse scenario, in which a company is easily able to become a cooperative. Scholars point to the fact that additional knowledge-building is needed in this area, as in the field of law, the cooperative receives scant attention when compared with the stock company or for-profit shareholder corporation, despite the track record of resilience cooperatives held throughout the 2008 financial crisis, or their ability to redress market failures, to point out two among a number of significant strengths[3].

Such global perspective tends to show that in a number of jurisdictions, legislation may be orientated towards traditional investor-owned enterprises, which may negate the specific people-centered approach of the cooperative movement, reflected by its values such as democracy and principles such as autonomy and concern for community. In other cases, the legislative balance may not be optimal. For example, a heavy focus on association and social elements prevents cooperatives from becoming competitive economic actors, however, a trend of 'companization' or an overly strong focus on the business element can impede and weaken the unique features of cooperatives[4]. At the opposite end of the scale, there are cases of forprofit businesses that may seek to utilize poorly monitored or under-regulated cooperative law to undue advantage or benefit, beyond the spirit of the law itself[5].

Another important point concerns the potential loss in economic activity and tax revenue bought by cooperatives when legal frameworks are insufficient or inadequate to help them thrive, and corresponding measures of GDP for many countries, as cooperatives are increasingly recognized as drivers not only of economic growth but also sustainable development, due to the presence of democratic and participatory decision making, indivisible capital, patronage refund or benefit for collective purchase, and equitable distribution of economic surplus[6]. A number of other issues have also been observed stemming from inappropriate legal frameworks, for instance with regard to governance and member relations. These issues and ensuring the preservation of the distinguished economic and social advantages of the cooperative model are becoming increasingly relevant in a globalized world and in forging an important contribution to the 2030 United Nations Sustainable Development Goals (SDGs), now a universally recognized political paradigm.

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[2] See for example: Linda Shaw, Discussion Paper: Overview of Corporate Governance Issues for Co-operatives, The Co-operative College, Manchester, United Kingdom, November 2006

[3] Ger J.H. van der Sangen, 'How to Regulate Cooperatives in the EU?', The Dovenschmidt Quarterly, 2014, pp. 131-146

[4] Henrÿ Hagen, 'Basics and New Features of Cooperative Law – The Case of Public International Cooperative Law and the Harmonisation of Cooperative Laws' Uniform Law Review, Volume 17, Issue 1-2, 1 June 2012, pp. 197–233.

[5] See Ger J.H. van der Sangen, 'How legislators deal with hybridization of cooperatives: fostering innovations or not?' presentation held at the 2018 International Cooperative Alliance Research Conference, 4-6 July 2018, Wageningen, Netherlands.

[6] For more information on the links between cooperatives and the SDGs please visit: https://www.ica.coop/en/sustainable-development-goals

It is also important to note that within the wider context of the social economy, many changes and innovations are taking place across various sectors and in different regions. New laws and shifting trends have prompted alternative models of organising and experimental enterprises to develop in the social and solidarity economy, which also has a corresponding impact on cooperatives and the cooperative movement. Whilst these innovations are not the focus of this study, the legal frameworks in place across different jurisdictions certainly helps to shape these innovations and trends in the wider field of the social economy, and arguably touches upon a further knowledge gap that this study may help to address.

With such knowledge gaps and the untapped potential of cooperatives in mind, this study aims to act as a part the puzzle in redressing a broader lack of available information, whilst also providing an additional added value to ICA members and relevant cooperative stakeholders. Thus, the study may also contribute to key outstanding questions for legal scholarship, such as – how should or can cooperative principles be translated into law? Going further, would the presence of cooperative principles in a growing number of jurisdictions allow such principles and the cooperative identity statement to be considered as a source of international law? With a growth in knowledge in this area, such work can contribute to ensuring that the cooperative model can be clearly distinguishable from other legal forms.

Added Value of the Research

In this regard, the mapping of cooperative legislation can provide additional added value. It can highlight and illuminate the specific situation across different regions and provide a basis for comparison and analysis. Clear and relevant information about the cooperative reality will be gathered and compiled in an online database that will be available to members and concerned stakeholders. This online database, currently in its development stage, serves as an elementary information portal and operational tool that enables the ICA regional partners to effectively share upcoming and ongoing activities, and disseminate the results of the research. These results will help in developing policy recommendations that may create an enabling environment for cooperatives and renew the legal frames in a targeted way across different regions and countries.

Further, at regional and local levels, members can be empowered in their advocacy work. In particular, they will have the opportunity to share the challenges and expectations met by themselves and their members regarding the applicable legal frameworks, and see these considerations reflected in the research results. Through increasing knowledge of the reality in the surveyed countries, cooperative apexes and federations can provide high quality assistance to their members on legal issues affecting them most, for instance taxation, and on political representation. At national level, the database aims to become a focal point for collaboration between federations and a strong reference for advocacy. At local level, the database directs primary cooperatives towards the representative federations and cooperative support structures in their region and country. This will lead to greater networking across the movement, and even the wider civil society movement as a whole, strengthening the international cooperative movement at various levels of governance and simultaneously bolstering its level of external recognition as a civil society actor.

At regional level, examples of pooled knowledge through existing networks can also be a source of assistance. For example, the Cooperatives Europe Development Platform (CEDP), a European network of ten cooperative organisations active in international cooperation from different sectors, would be in a strong position to offer support in different areas, due to its central position in a larger cooperative

network[7]. This expertise and knowledge can be shared with other regional offices and serve as a model for collecting and displaying relevant information from different regions. Further, if a general legislation exists in a particular country, cooperative experts from the ICA network could be in a position to aid those concerned, and in certain circumstances, use the national research results as a basis to propose or insert adjustments and references to adapt the legislative text - or offer various other forms of technical and operational support. The study may help ICA gain further expertise in aiding nations with evidence-based advice on what may qualify as improved cooperative law or law concerning cooperatives, as is currently happening in the United Nations Economic and Social Council (ECOSOC) and the International Labour Organisation (ILO). This can help to enlarge the potential field of activity for the cooperatives in the country concerned. In short, the research aims to address these knowledge gaps, namely a lack of consistent and reliable legal data in a harmonized location, whilst acting as a source of added value to ICA members and cooperative stakeholders.

Literature Review

When analyzing existing literature, there are a number of previous studies conducted across different regions with a focus on cooperative legislation and the various reforms required to facilitate new or improved cooperative law. A key supporting document at the global level is the 'International Handbook of Cooperative Law' (2013), previously utilized by ICA members, which has also become a source of guidance and input for the research[8]. Prior to this document, another key report on cooperative law is the 'Guidelines for Cooperative Legislation', published jointly by the ILO and the Committee for the Promotion and Advancement of Cooperatives (COPAC) in 1998, whose latest revision was published in 2012. This third revised edition builds on a wide consultation process and takes into consideration the latest developments, including the adoption of two major international instruments on cooperatives, the 2001 UN Guidelines aimed at creating a supportive environment for the development of cooperatives and the 2002 ILO Recommendation No.193 on the promotion of cooperatives[9]. Most famously of course, the definition, values and principles of cooperatives are outlined and globally acknowledged in the form of the ICA Statement of the Cooperative Identity of 1995[10].

At the regional level, the last study completed in 2012 for the Asia and Pacific Region concluded that most countries do not have cooperative laws and policies in compliance with the ICA Cooperative Principles[11]. This was in part impacted by the 2012 UN International Year of Cooperatives, which through greater exposure brought a surge of amendments in cooperative law in certain countries (such as the Republic of Korea) yet compliance with ICA principles remains a difficulty. At the European level,

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[7] For more information on the Cooperatives Europe Development Platform (CEDP) and its projects, please visit https://coopseurope.coop/development/

[8] Dante Cracogna, Antonio Fici, Hagen Henrÿ (eds) 'International Handbook of Cooperative Law' SpringerVerlag Berlin, Heidelberg, 2013, 823 pp.

[9] Hagen Henrÿ, 'Guidelines for Cooperative Legislation' International Labour Office – 3rd ed. rev. Geneva: ILO, 2012. International Labour Organization (ILO) and 'Recommendation 193 of 2002 concerning the promotion of cooperatives', International Labour Conference, Geneva

[10] For more information, please see the ICA Website: https://www.ica.coop/en/whats-co-op/co-operativeidentity-values-principles

[11] For reference see the 'ICA Asia-Pacific Study on By-laws of Primary Co-operatives in the Asia-Pacific Region, Presented at the 1st Asia-Pacific Co-operative Registrars Conference, ICA Asia-Pacific, Kuala Lumpur, Malaysia, 2013.

cooperatives dispose of a cross-border legal reference frame, the Statute for a European Cooperative Society (SCE). This statute has been adopted by the Council in 2003 and is based on an extensive comparative analysis of existing national laws and good practices in EU member states. Today it is often used as a reference, though certain scholars have questioned its legal utility based on the frequency of use and limited success of the Statute[12]. The Statute builds upon elements of the respective national cooperative law, which in practice means that there could be up to 28 different variations of SCE[13]. In addition, a 2010 report, co-produced by Cooperatives Europe for the European Commission, has analyzed the implementation of the Statute in various European states[14].

In the Americas region, the regional office of the ICA has also been active in shaping cooperative legislation, and a new legal framework has also been developed, which is based on the International Labour Organization (ILO) recommendation 193 and the seven cooperative principles of the ICA. The result, the Mercosur Common Co-operative Statute of 2009, also facilitates the cross-border establishment of cooperatives. The Latin American Parliament unanimously adopted this legal framework in 2009 and issued a non-binding recommendation[15]. On the African continent, the OHADA Convention, introduced in 1993 with 14 State Parties from Western and Central Africa, plays a similar role and sought to modernize business law whilst overcoming the prior influence of colonial laws[16]. One key common challenge remains the transposition of such recommendations into national legislation, which are currently at very different states of advancement in relation to their respective supranational frameworks. Consequently, whilst there is a strong existing basis from which to build upon, more research and work is needed to ensure the distinctiveness of the cooperative organisation as a legal entity.

In order to remedy the situation and advocate for reforms of the legal framework, the cooperative federations and institutions can benefit from gaining extensive knowledge of these legal frameworks and raise awareness of which elements make the best targets for initial improvement. Improved data on existing laws is therefore greatly needed in order to monitor the evolution of the legal frameworks in the regions and to be able to provide the appropriate actions and recommendations in each context. This knowledge is an important tool to advocate for the inclusion within national and regional regulations for a diversity of enterprises, effective legal regulations for cooperatives and a level- playing field across the business enterprise landscape. The strategy for achieving this goal is broken down into three interrelated objectives, which are summarized in the following section.

[12] Henrÿ (2012), pp. 197–233 and van der Sangen (2014) pp.131-146. See also Cooperatives Europe, Euricse and Ekai Center, 5 October 2010, Study on the implementation of Regulation 1435/2003 on the Statute of European Cooperative Societies, Final Study Executive Summary and Part I: Synthesis and comparative report.

[13] Münkner H-H. (2013), "Worldwide regulation of co-operative societies – an Overview", Euricse Working Paper n. 53 | 13

[14] See Cooperatives Europe, Euricse and Ekai Center, 5 October 2010, Study on the implementation of Regulation 1435/2003 on the Statute of European Cooperative Societies, Final Study Part II: National Reports.

[15] Cracogna (2013) cited in Cracogna, Fici & Henrÿ (eds) 2013, pp. 153.

[16] See Hiez, David, Tadjudje, Willy, 'The OHADA Cooperative Regulation' in Cracogna, Fici & Henrÿ (2013) pp.89-113.

Objectives

The legal framework analysis (LFA) to be conducted under the partnership for international development has three primary interrelated objectives.

The first objective is to acquire general knowledge of the national legislation on cooperatives, including but not limited to the legislation in force in the 109 countries (as of July 2018) represented by ICA members, as well as of supranational cooperation legislation if existent - for instance, as already mentioned in the present paper, in the European Union where Council Regulation no. 1453/2003 establishes and regulates the European Cooperative Society[17]. Another aforementioned example is the Statute of Mercosur Cooperatives, the Common Cooperative Statute in the Americas since 2009. Specifically, the research will gather general knowledge of the national cooperative legislation, its main characteristics and contents, with particular regard to those aspects of regulation regarding the identity of cooperatives and its distinction from other types of business organizations, notably the for-profit shareholder corporation. Such aspects include but are not necessarily limited to; details on cooperative membership and governance, financial structures such as capital requirements, external control, cooperation between and among cooperatives, and elements related to taxation. In countries where cooperatives are primarily regulated at the regional level or at the state level (as is the case for federal countries), acknowledging the difficulties in providing a full picture of all the different regional or state regulations, priority will be given to the most representative (or innovative) regulations. The legal framework analysis will also focus on aspects of interest such as cooperative organisational law and tax law, paying attention to other regulations such as those on labour and public procurement, among other key details. In those countries where both a general cooperative law and special cooperative laws on particular types of cooperatives exist (for example, agricultural cooperatives, worker cooperatives, consumer cooperatives, social cooperatives, cooperative banks) the results should in principle be based on the general cooperative law. However, references to special cooperative laws (or to single provisions within it) will also be made when these special laws have a significant impact on cooperatives due to their importance or level of coverage. Due to such diversity and complexity, the situation is arguably largely dependent on the contextual background within each jurisdiction covered.

The second objective is to evaluate the national jurisdictions covered by the legal framework analysis according to their enabling environment for cooperatives, in order to compare national cooperative laws with the indicators provided in a questionnaire distributed to respondents, to gain an understanding of the scale of the 'cooperative friendliness' of the national legislation. More specifically, to evaluate whether the national legislation in place supports or impedes the development of cooperatives, and is therefore 'cooperative friendly' or not, and the degree to which it may be considered so, also in comparison to the legislation in force across other countries of the ICA region (or at the supranational level). It is important to note that this will not be in any way intended as a method to create a 'blacklist' of unfavourable jurisdictions, but rather to create an assessment tool that can aid future policy recommendations.

The third and final objective is to provide recommendations for eventual renewal of the legal frameworks in place. This is in order to understand which changes in the current legislation would be necessary to

[17] See Council Regulation (EC) No 1435/2003 23 July 2003 on the Statute for a European Cooperative Society (SCE). For example, the preamble (7) reads 'Cooperatives are primarily groups of persons or legal entities with particular operating principles that are different from those of other economic agents.'

improve its degree of "cooperative friendliness", in other words, to make the legislation more favourable to cooperatives, also in consideration of their specific identity as a legal entity. This objective can contribute to the wider aim of considering the different avenues through which the cooperative principles may be translated into law. Further, as mentioned above, this objective will also serve ICA members and relevant stakeholders on advocacy work, especially considering that ICA member organisations will be invited to contribute to these recommendations. Based on this input, the cooperative network will be in a position to provide improved assistance to their members on legal issues and political representation. With these three objectives achieved, this study will be able to contribute to addressing the knowledge gaps previously identified, doing so by a harmonized methodological process elaborated below.

Methodology

The central methodological process is being conducted in two stages. This involves utilizing a common questionnaire as primary method of data collection, which will then be used to produce national reports. One of the most important methodological concerns was that each of the aforementioned objectives and the research process was to be developed and carried out in a harmonised way, with a common methodology co-constructed in a horizontal manner and implemented by all the ICA offices. This increases the ownership and visibility of the process across all regions, mirrors the value of cooperation and allows all regions to offer real input and expertise. In order to collate the necessary evidence about the practical application of cooperative legislation and policies at national and regional levels, the majority of the research activities are carried out at a decentralized level, with coordinated support from the global level.

With this in mind, a methodological structure was jointly developed with the support of external partner Euricse (European Research Institute on Cooperative and Social Enterprises) and with input from the ICA regional offices. Following the definition of a harmonized questionnaire for data collection at the regional and national level (addressing aspects such as cooperative membership and governance, financial structures, external control, cooperation among cooperatives, and elements related to taxation, among other key features), regional legal experts have been externally recruited to facilitate the collection of this data. With the support and expertise of the regional experts, a number of national experts have also been selected to be involved in the data collection at the national level. External experts form a core part of the process due to the intellectual rigor of the subject and the wish to include the wider cooperative legal community in the research process.

After this initial recruitment phase, the experts, assisted by the provision of the questionnaire, have begun the process of data collection at the regional and national level. Questionnaires will be submitted by national legal experts for each of the jurisdictions covered by the legal framework analysis (i.e. a foreseen minimum of 109). A single legal expert may cover two or more different jurisdictions, due to her/his expertise, the absence of language barriers and the characteristics of the cooperative legislation (e.g. when the same cooperative law might be in force in several countries due to supranational law unifying national jurisdictions, in line with the examples cited earlier). The regional legal experts are also expected to act as national legal experts for their respective countries of expertise. This material will form the basis for national reports to be submitted by the national experts for each country and jurisdiction covered, which will be carefully reviewed by the research team.

In order to ensure that the wider process is streamlined, a pilot phase has been launched, sampling two countries for each region (Americas, Europe, Africa and Asia Pacific). Feedback from the pilot phase is intended to ensure that the full process is smoothly completed by 2020. Following the successful completion and collection of data and national reports, the reports will be uploaded and displayed on the online database. Subsequently, the analysis shall be presented in four harmonized regional reports, one for each ICA region; which shall contain, among other things, the main highlights of each national report of the area. As mentioned, this database will become a focal point for collaboration between federations and a strong reference point for advocacy activities.

From this firm basis, the regional and national reports can be fully compiled into one larger and comprehensive global report, allowing the results to be integrated in a harmonized way, and further displayed within the database. These reports form the major deliverables of the project.

In regard to challenges faced, it is expected that several may occur at various points during the research process, both operational challenges and those relative to the content and analysis may occur. The pilot phase of the research provides an opportunity for these challenges to be addressed and to feed in the knowledge acquired at the latter stages of the research process. During the planning phases, a number of key success factors were identified, such as clear and precise definitions for the questionnaire, the horizontal and harmonized methodological process, and the expertise and input of national and regional experts, which seeks to bridge the gap with scholars and policymakers.

Key findings and Next Steps

At the time of writing, national and regional recruitment and data collection is currently ongoing worldwide. Regional and national experts are being successfully recruited within the ICA regional offices and jointly collaborate and communicate with research staff and other partners throughout the research process. This allows for any challenges that may occur throughout the data collection process to be addressed effectively, whilst also taking into consideration any feedback from the pilot phase of the research. Therefore, the expected primary findings of this research are, as previously described, harmonized data on cooperative law and its main provisions, both at the national and supranational level, including a critical analysis of existing provisions that hinder or promote cooperatives. Findings at the national and regional level will need be contextualized within the regional and global contexts respectively, providing a useful background for such critical analysis. As mentioned, the results of the research will also be made available through a dynamic online platform, in order to enhance their dissemination and ensure that the data obtained can be easily updated. The harmonized database to store the findings is currently in developmental stages, nearing completion.

As a global process carried out jointly by all ICA regions, the research is expected to have a significant outreach both within and outside the cooperative movement. The website should act as a locus for information on cooperatives that can foster greater knowledge sharing between ICA members, the wider cooperative movement, as well as other key stakeholders such as CSO partners and policymakers. The conclusions to be drawn from the legal framework analysis are going to be used to document the implementation of cooperative legislation and policies and monitor their evolution, whilst helping

cooperatives with their advocacy and recommendations on the creation or improvement of legal frameworks.

In regard to specific outputs and next steps, data collection and analysis will continue to cover as many jurisdictions as possible. At the end of the process, by 2020, the analysis will be presented in 4 harmonized regional reports, produced by each ICA region, that will showcase the main highlights of each national report. These regional reports will then be gathered in one global report, to centralise all the information collected at national and regional level. The legal framework analysis will contribute to enrich knowledge about the cooperative movement and cooperatives' legal environment on a global scale, helping researchers and decision-makers to gain easier access to the data collected for their research or policy purposes, among other added values previously elaborated above.

Conclusions and recommendations

This paper has discussed the ongoing research designed to analyze legal frameworks from the national to the supranational level, conducted under the ICA-EU partnership for international development, which aims to strengthen the cooperative movement and its global capacity to promote international development. It has covered the knowledge gaps, added value elements, key objectives, and methodological details relevant to the research process and the analysis of cooperative legal frameworks. It highlighted that the lack of consistent and reliable information about cooperative legislation is a strong challenge, as is the fact that the data available on the cooperative landscape tends not to be harmonized. In many countries, certain types of cooperatives are unable to develop, as the current legislations do not foresee or permit it to do so. This research therefore aims to address this knowledge gap and through doing so, it can become a major source of added value for cooperators and ICA members, by highlighting the specific situation across different regions and providing a basis for comparison, analysis, and improvement.

Considering the need for the cooperative business model to benefit from enabling legislation and policies and the negative impact of weak or harmful laws, this initiative strives to make knowledge on legal frameworks more accessible to cooperative organisations and provide them hands-on tools to support their advocacy and recommendations. This aids the creation or improvement of laws and can contribute to the recognition of cooperatives as a specific legal entity in an increasing number of jurisdictions. The study will also evaluate jurisdictions and policy regulations currently in place according to their degree of enablement of cooperative development, in other terms their 'cooperative friendliness'. This will allow the improvement of the legal frames across different regions and enable monitoring, including the provision of the appropriate actions and recommendations in each specific context. Such recommendations for renewal of the legal frameworks will help to shape the policy agendas in a targeted way across different regions and countries.

Given the important shifts taking place within legal scholarship and in global politics including in light of the international development priorities advanced by the Agenda 2030, cooperatives will certainly benefit from regulations that acknowledge their specificities, ensure a level playing field with other types of business organizations, and overall help them unlock their full potential in terms of inclusive growth. This paper asserts that the absence of a specific legal framework for cooperatives, or the presence of a weak or

inadequate legal framework, can negatively impact cooperatives and their evolution; while in contrast, the existence of supportive regulations can foster cooperative development and act as a driver of sustainability. This research further shows that by acknowledging and exchanging different experiences and good practices in cooperative law at the national, regional and global levels, we can promote new synergies between partners, foster new alliances and share knowledge that can benefit cooperatives as people-centered organisations and strengthen the cooperative movement worldwide.

References cited

Council Regulation (EC) No 1435/2003 23 July 2003 on the Statute for a European Cooperative Society (SCE). EU Lex, European Union.

Cracogna, Dante, Antonio Fici Hagen Henrÿ (eds) 'International Handbook of Cooperative Law' Springer-Verlag Berlin, Heidelberg, 2013, pp.1- 823.

Cooperatives Europe, Euricse and Ekai Center, 5 October 2010, Study on the implementation of Regulation 1435/2003 on the Statute of European Cooperative Societies, Final Study Executive Summary and Part I: Synthesis and comparative report.

Cooperatives Europe, Euricse and Ekai Center, 5 October 2010, Study on the implementation of Regulation 1435/2003 on the Statute of European Cooperative Societies, Final Study Part II. National Reports.

Ger J.H. van der Sangen, 'How to Regulate Cooperatives in the EU?', The Dovenschmidt Quarterly, 2014, pp. 131-146.

Ger J.H. van der Sangen, 'How legislators deal with hybridization of cooperatives: fostering innovations or not?' presentation held at the 2018 International Cooperative Alliance Research Conference, 4-6 July 2018, Wageningen, Netherlands.

Hagen, Henrÿ, 'Basics and New Features of Cooperative Law – The Case of Public International Cooperative Law and the Harmonisation of Cooperative Laws' Uniform Law Review, Volume 17, Issue 1-2, 1 June 2012, pp. 197–233.

Hagen, Henrÿ, 'Guidelines for Cooperative Legislation' International Labour Office – 3rd ed. rev. Geneva: ILO, 2012. International Labour Organization (ILO).

ICA Asia-Pacific Study on By-laws of Primary Co-operatives in the Asia-Pacific Region, Presented at the 1st Asia-Pacific Co-operative Registrars Conference, ICA Asia-Pacific, Kuala Lumpur, Malaysia, 2013.

Münkner H-H. (2013) "Worldwide regulation of co-operative societies – an Overview", Euricse Working Paper n. 53 | 13.

Recommendation 193 of 2002 concerning the promotion of cooperatives, International Labour Conference, Geneva.

Schaffer, Jack, Historical Dictionary of the Cooperative Movement, Scarecrow Press, London, 1999.

Shaw, Linda Discussion Paper: Overview of Corporate Governance Issues for Co-operatives, The Co-operative College, Manchester, United Kingdom, November 2006.

Interviews

INTERVIEW WITH PROFESSOR DR. DANTE CRACOGNA

Questions prepared by Ifigeneia Douvitsa and Hagen Henrÿ

Introducing Professor Dante Cracogna, justifying an interview on cooperative law with him, amounts to carrying owls to Athens or, as the English say, coal to Newcastle. What will our answer to Aristophanes be? Nevertheless, just this much for the record: Professor Cracogna, like Professor Münkner, is one of those academics with a practical hand who have, over decades, tirelessly and against all odds promoted the idea of cooperative law as a subject in its own right. He has generously shared, through numerous publications and otherwise, his knowledge on the cooperative law of his own country, Argentina, and of the countries of the Americas, south, central and north. He has also skillfully explained and bridged the differences between continents and/or legal traditions, all of which are familiar to him. He continues to do so.

Douvitsa & Henrÿ: *Professor Cracogna, we are very grateful that you agreed to be interviewed for this 2nd issue of the International Journal of Cooperative Law (IJCL). Before we start with the interview proper, we would like to evoke your relationship with Professor Münkner whom, of course, we interviewed for the first issue of this journal. Insiders refer to you two as the Popes of cooperative law. Contrary to the history of Popes and Antipopes You seem to have used your status for our benefit by synergizing. We are sure we are right.*

Pofessor Cracogna: Firstly, I appreciate the reference to Professor Münkner with whom I am honored to have had a cordial and beneficial relationship over many years. But if Professor Münkner can legitimately be considered the Pope of cooperative law, I am just a bishop of a remote provincial diocese. I have learned a great deal from his generous teachings by reading his publications, listening to his lectures and talking to him personally. I believe my debt to him is shared by many worldwide.

Douvitsa & Henrÿ: *As the IJCL is still an infant, we would like to ask you similar questions to the one we asked Professor Münkner: Can the revived interest in cooperative law be sustained and if so, what are the most needed actions the international academic community must take to further the field of cooperative law? Are there challenges? May they be overcome? Given these uncertainties, is the publication of a journal like the IJCL a premature undertaking?*

Professor Cracogna: I think that in recent years there has been a renewed interest in cooperative law, to which Professor Münkner has contributed a lot. The maintenance and growth of this interest will depend, fundamentally, on publications on the subject in order to reach an increasing number of people in academia and the law courts as well as the lawyers practicing in the cooperative movement, which will invigorate and strengthen the dissemination and knowledge of cooperative law. In this line, the IJCL will

have an important role, just as the Bulletin of the International Association of Cooperative Law and the Law Journal of CIRIEC-Spain has in the Spanish language.

Douvitsa: *Speaking about the future of cooperative law means speaking about younger scholars and professionals. Would you encourage them to specialize in this field? On what should they focus?*

Professor Cracogna: In the modern world, which has focused predominantly on self-interest and excessive profit, we perceive that young people are eager for a change towards a more equitable, sustainable and environmentally-friendly organization. I think it is necessary to get them better acquainted with the cooperative instrument in order to fulfill this desire, especially in the University where teaching is focused exclusively on profit-driven organizations of the economic activity and cooperatives are almost completely ignored. Knowledge of these entities would provide young professionals a field of work that would meet their personal needs with a more humane and caring viewpoint.

Douvitsa&Henrÿ: *When, why and how did you develop an interest in cooperative law? Did anybody inspire/encourage you to do so?*

Professor Cracogna: My father, manager of an agricultural cooperative and member of the board of an insurance cooperative for many years, has indeed been a source of inspiration and at University I was fortunate enough to meet some professors who encouraged my interest in the subject. I believe that the influence of people close to us stimulates our vocation and each of us is, to a certain extent, a product of what others have given us - although sometimes we may not have responded adequately to those incentives.

Douvitsa & Henrÿ: *One of your intellectual children and "political" achievements is the Ley marco para las cooperativas de America Latina (Framework law for cooperatives in Latin America). Its history spans over a long period of time; a second edition in 2008 followed the 1988 one. Obviously, socio-economic and political circumstances changed several times. The details of the processes, which eventually led to the adoption of the current Ley marco, would fill volumes. Could You please present us a summary? We would especially like to know your assessment as to the effects of this legally hard to qualify instrument on cooperative legislation in Latin America. If it is, as we think it is, at least of a persuasive nature, then it would not only constitute a model for the substantive cooperative laws, but also an example of a new way of law-making by having private organizations and public authorities, the cooperative organizations in Latin America and the Parlamento Latinoamericano (group of parliamentarians who endorsed the Ley marco), co-create law. This is not dissimilar to the International Labor Conference integrating in 2002 the text of the 1995 International Cooperative Alliance Statement on the cooperative identity (ICA Statement) with slight changes (which might be interesting to analyze) into the text of the International Labor Organization Recommendation No.193 concerning the promotion of cooperatives (ILO R. 193).*

Professor Cracogna: The Framework Law for Cooperatives in Latin America was anticipated by important precedents that provided favorable grounds for its conception. In this regard it is important to highlight the work carried out at the time by the Cooperative Division of the Organization of American States (OAS) advising the Governments of the region on cooperative legislation and the Continental

Congresses on Cooperative Law sponsored by the Organization of Cooperatives of America (OCA). The purpose of this Organization-which no longer exists-was to contribute to the advancement of cooperative legislation in the continent and to this end promoted, among other actions, the groundwork for a framework law that would serve as guidance for the modernization of the national laws on the subject. It was not about providing a model law to be copied, but a project based on cooperative principles and best practices experienced by different countries. To this end, a group of specialists were summoned to several meetings, and carried out consultations with the cooperative movement and academia, resulting, after two years of labor, and numerous drafts, in a document that the OCA approved in the Congress held in Bogotá in 1988. From there it was widely disseminated and its influence is evident, in varying degrees, in practically in all the cooperative laws that were subsequently sanctioned, beginning with the Colombian law of that same year. The revision of the Framework Law, promoted twenty years later by Cooperatives of the Americas, was intended to update the document taking into account the Statement on the Cooperative Identity of the ICA and the new developments in cooperative law world-wide. This was backed by the ILO, especially by the Head of the Cooperative Service at that time, my friend Hagen Henrÿ. It is heartening to observe that this effort has been rewarded, because when analyzing the legal reforms carried out later in the countries of the region, there is clear evidence of the influence of the Framework Law. Indeed, the fact that the Latin American Parliament – a consultative body consisting of representatives of the parliaments of the countries of the region – has approved the Framework Law in 2012, helps to give it greater relevance.

Douvitsa & Henrÿ: [1] *The role of the state in cooperative development has varied over time, in your part of the world as also elsewhere. At the international level (the ICA Statement, the 2001 United Nations Guidelines aimed at creating a supportive environment for the development of cooperatives (UN Guidelines) and the ILO R.193) we agree that the principle of equal treatment must apply to the relationship between the state and cooperatives. The dual nature of cooperatives – they are associations of persons cum enterprise – indicates the complexity when it comes to applying this principle. From the perspective of a European (cooperative lawyer) it appears that, exceptions put aside, the Latin American state has been inclined to exercise more influence on cooperatives than its European counter-part and has been criticized for that. If true, doesn´t this criticism overlook a radical historical difference whose effects are still with us? I refer to the fact that in Europe the first cooperative laws built on an existing or at least nascent cooperative reality, whereas the first cooperative laws in your part of the world were conceived as an instrument to create this reality. Your answer might also address the other side of the coin, so to speak, i.e. the principle of political neutrality of the cooperatives that the ICA deleted from its list in the 1960ies.*

Professor Cracogna: This is an interesting question that provides material for an extensive answer. In fact, on the issue of relations between the State and the cooperatives there are countless papers. In Latin America, there are two different regions; the so-called "Southern Cone" that covers the south of Brazil, Argentina, Uruguay and Chile, with populations that are mainly the product of European immigration that brought cooperative experiences from their countries of origin and put them into practice before law-makers concerned themselves with cooperatives. For example, in 1889 in Argentina, when the first

[1] Professor Münkner kindly provided ideas concerning especially this question.

provisions on cooperatives were introduced in the Commercial Code, cooperatives already existed, as the Commission that drafted the reform bill pointed out. Consequently, in these countries, cooperative acts approved between the end of the XIX Century and the beginning of the XX Century have generally followed the European model. Conversely, in the rest of the continent the legislation follows the pattern that Professor Münkner calls "Indo-British." This model, which could be called "promotional" or "interventionist", has effectively prevailed in most Latin American countries, with all the difficulties it may entail. There is however a healthy trend towards greater autonomy in recent years influenced by the 4th principle of the Statement on the Cooperative Identity of the ICA as well as the UN Guidelines of 2001 and ILO Recommendation 193, in addition to the Framework Law.

Henrÿ: *You seem to put greater emphasis on the UN Guidelines than on the ILO R.193. Is my impression correct? If so, what are your reasons to do so?*

Professor Cracogna: Both documents are of significant importance as they constitute clear and defined guidelines for cooperative legislation and policy, considering that ILO Recommendation 193 expresses the will not only of governments but also of workers and entrepreneurs on a global scale. Perhaps the references to workers and workers´ cooperatives – understandable in the ILO Recommendation- may subtract some degree of scope from it, but this in no way lessens its relevance.

Douvitsa & Henrÿ: *There are many more cooperative lawyers in Latin America than in Europe, hence more interest there than here. True? Not so true? If true, what is your explanation?*

Professor Cracogna: I would not presume to assert that there are more cooperative lawyers in Latin America, although I could say that we have been carrying out various activities aimed at raising lawyers ' interest in Cooperative Law. In fact, we have carried out this activity because university education in general does not cover this topic. In recent years we have managed to get some law faculties to include subject matter on cooperatives in their syllabi, which has resulted in an increase in the number of lawyers interested in cooperative law. We believe that we must continue on this incipient path and promote a growing production of publications on the subject, as well as the organization of meetings for dissemination and exchange.

Douvitsa&Henrÿ: *Indisputably, the higher number of cooperative lawyers in Latin America has led and continues leading to more publications on cooperative law and to the hatching of innovative ideas. One of them, albeit not new anymore, is the acto cooperativo– often misunderstood as cooperative act (law) - on which You have written with great authority. It is now part of most cooperative laws in your region and it is also part of the Ley marco para las cooperativas de America Latina. Why has it not become an object of export/import? Other examples could be the elaboration of a specific founding document for cooperatives (statute of association) and the work on good cooperative governance.*

Professor Cracogna: The concept of the “cooperative act” has been the subject of doctrinal development that began in the 1950’s. At that time, it became apparent that the activity that cooperatives carry out with their members is virtually an internal operation, without the conflict of interests that arises if the service has a purpose other than the realization of the social object. These points characterize a legal act of a specific nature, which differ from those made by other subjects of law, at the same time also recognizing that cooperatives can also perform non-cooperative acts, even with their own members, when those acts do not relate to their social object. From these initial findings, the theory of the cooperative act evolved; at

first introduced into case law in a timid way because it lacked the legal support that finally appeared at the beginning of the 1970's and spread to many countries in the region. This is not an exotic concept; it provides a legal interpretation of the cooperatives' specific activity, even if the law does not mention it. The law merely recognizes a cooperative act; it does not create it. It may be compared to what in Spain is defined as an "actividad cooperativizada". Its effects have to do with the applicable regime which is, firstly, the cooperative legislation and the statute of the cooperative, then with the other relevant sources of Cooperative Law and, finally, in an ancillary manner, with the rules governing the figure that the activity assumes (sale, mandate, commission, loan, etc.). Greater and better communications will help to make the cooperative act better known and understood, thus contributing to building a real understanding of cooperative law worldwide.

Douvitsa & Henrÿ: *In November 2019 you will organize another (Latin American) Continental Congress on Cooperative Law. It will be a special one, as it is to commemorate the first one organized half a century ago. What do you remember of the first congress? Is it possible to draw a line between then and now or are these 50 years rather marked by discontinuities? You may want to broaden your answer and describe the development of cooperative law in general, world-wide, in time and space. Can we delineate any patterns?*

Professor Cracogna: I consider that the First Continental Congress on Cooperative Law held in the city of Mérida (Venezuela) in 1969 with the sponsorship of the University of the Andes as a milestone of great importance for the development of Cooperative Law. For the first time scholars and lawyers from different countries interested in the matter, convened by the legal committee of the OCA, met to analyze the issues that at that time were in the limelight. Precisely one of these topics was the "cooperative act" which generated a productive debate with conclusions that were published in the "Letter of Mérida", the closing document of the Congress. This concept was incorporated two years later in Brazilian Law 5764 and two years later in Argentine Law 20.337; subsequently it was widely included in Latin American legislation. This concept constitutes the recognition of the peculiar nature of cooperatives, different from both profit-driven and non-profit activities, so it requires a different legal treatment, subject to specific legislation and to the statutes of a particular cooperative. The use of other standards should be supplementary, making sure that those standards conform to the nature of the cooperative. In short, the very meaning of the phrase "co-operative act" defines the singularity and difference of cooperatives. Of course, this applies to all kinds of cooperatives and also affects other legislation linked to cooperatives, such as laws on labor, competition, consumer, taxation, etc.

Henrÿ: *Dante, we met for the first time in the mid-nineties of last century at the International Labor Organization in Geneva on the occasion of a preparatory meeting on …. I was a novice then – as far as cooperative law is concerned. You knew that, but you never let me know that you knew. When I dared, in this situation, to start writing what became the "Guidelines for Cooperative Legislation" (in French), your comments on the various drafts were always prompt (to avoid greater damage, I suppose), sharp and in an inimitable way diplomatic, constructive and encouraging. What is the secret behind remaining composed when confronted with stupidities, written or presented orally? Innumerable times thereafter we met, worked together (on the Ley marco para las cooperativas de America Latina, the "International Handbook of Cooperative Law", the organization of conferences etc.), exchanged views - by far not always on cooperative law!*

Professor Cracogna: Life provides us with great opportunities to enrich ourselves with the knowledge and friendship of other people; in this sense Providence has been very generous with me, as Hagen remembers. Undoubtedly, having had the opportunity to share that seminar in Geneva was a gift for which I`ll always be thankful, which I still enjoy at present, constantly renewed by new academic and personal experiences that I trust will continue for many years.

Douvitsa & Henrÿ: *By their internationally recognized objectives, cooperatives must not let the economic and social aspect of the promotion of their members or of their activities for the benefit of third parties drift apart. The same obligation is put on the cooperative legislator. The parallel with the purpose of the International Labor Organization's Constitution is obvious. So is the congruence between the objective of cooperatives and those human rights laid down in the binding 1966 United Nations Covenant on economic, social and cultural rights. This balance is not easy to establish and maintain; the weight given to one or the other will vary. However, the latter variations will determine, to a large extent, whether cooperatives are included in the social (and solidarity) economy. Southern Europe and Latin America seem to include them; other European countries, North America and Australia do not. If this statement is not too simplistic, what is your explanation of the phenomenon and what are the implications for cooperative law?*

Professor Cracogna: It is generally recognized that the Social Economy is well-rooted principally in countries such as France, Spain, Italy and Portugal. However, in recent years, the European Union has also paid special attention through various documents and there has been intense activity by the European Commission on the Social Economy. In Latin America something similar has happened, although other currents of similar meaning have also emerged: solidarity economy; popular economy; labor economy; etc., without a clear differentiation between them. The general idea is that these denominations have a generic character, something vague, capable of sheltering numerous and sometimes somewhat heterogeneous organizations, among which are the cooperatives. Apparently, this does not lead to theoretical or practical problems, as long as such organizations are not indiscriminately confused with each other. Cooperatives have an economic and legal profile clearly defined by the co-operative principles and the co-operative law. Nevertheless, this does not prevent cooperatives from exhibiting some common traits with other organizations that are different from them. Nor does it mean that they cannot maintain collaborative relations and make common cause to face certain economic and social problems. But cooperatives have their own economic and legal logic.

Douvitsa & Henrÿ: *Commonly, we share phenomena whereby the distinctive features of cooperatives are being diluted through what I call the companization of cooperatives and the convergence of all forms of enterprise. This is the main reason why the ICA at its last General Assembly in Buenos Aires in 2018 established an Identity Committee whose task it is, among others, to monitor such moves by legislators and regulators. Recently, there has been a case of an amendment to the taxation of cooperatives in your country, which might be classified as an example of companization.*

Professor Cracogna: Characterizing the serious danger currently facing cooperatives as "companization" is a warning, because it points to the widespread tendency to equate, or assimilate, cooperatives with the companies or investor owned enterprises, denying their particular nature. Under the pretext of equal treatment with other enterprises, the intention is to undermine the singularity of cooperatives. If this danger is not clearly perceived, in a few years cooperatives will cease to exist as such, for the justification

of their existence will have been lost. Precisely, the intent to apply a tax treatment identical to that of profit-driven capital firms constitutes a way of denying the cooperative difference and, therefore, its very reason for existing; this is what has happened recently in Argentina which for the moment, we have managed to forestall. Therefore, the ICA's decision to establish a Cooperative Identity Committee to monitor these issues is a wise decision that is in line with the Plan for a Cooperative Decade, which defined identity as one of its axes.

Douvitsa & Henrÿ: *Would you like to develop additional ideas?*

Professor Cracogna: I would like to highlight the importance of the Congress on Cooperative Law that will take place on November 20th to 22nd, 2019, in San José de Costa Rica, coinciding with the fiftieth anniversary of the already mentioned Mérida Congress. The heritage of this first Congress is very valuable and has been enriched by successive Congresses held in Puerto Rico, Argentina, Brazil and Uruguay. The San José meeting will allow us to review the progress achieved in fifty years and to update current thinking on continental cooperative law with the future in mind. Although it is a regional Congress, the participation of stakeholders from all over the world is welcome, in the belief that the wide-ranging and borderless dialogue would help to strengthen the universal character of cooperatives and their presence in the legal framework of all countries.

Douvitsa & Henrÿ: Thank you, Professor Cracogna, for this interview.

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